THE LANCET.

VOL. V.—NO. 12.] LONDON, SATURDAY, DEC. 25, 1824. [*Price* 1*s*.

MR. ABERNETHY'S MOTION

FOR AN INJUNCTION.

COURT OF CHANCERY,

FRIDAY, DEC. 10.

Abernethy v. *Hutchinson and Others.*

FOR THE PLAINTIFF:

Counsel.

Solicitor General and *Mr. Rose.*

Attorneys.

Messrs. Bourdillon and *Hewitt.*

FOR THE DEFENDANT:

Counsel.

Mr. Horne and *Mr. Shadwell.*

Attorneys.

Messrs. Fairthorne, Lofty, and *Hickes.*

The Solicitor General stated, that he had a motion of some importance, and certainly of a very pressing nature, to submit to his Lordship. It was an application on the part of Mr. Abernethy, surgeon and lecturer at one of the public hospitals, for an injunction to restrain the publication of his lectures, professed to be given verbatim, in a work called *The Lancet.*

Mr. Horne hoped the motion would be allowed to stand over for a few days. If this explanation had been made *ex parte*, he should have had nothing to say, but notice had been given, and the affidavits had been filed only the day before yesterday. He wished the matter, therefore, to stand over until to-morrow week.

The Solicitor General observed upon the importance of restraining the publication of these lectures without delay. The affidavits which had been filed, in fact, did not require any answer, as they merely negatived the fact of having given leave to any party to publish his lectures. It was also to be recollected, that the next number of *The Lancet* was to be published to-morrow morning.

Mr. Shadwell said, that the lectures of Mr. Abernethy had been published in a series of numbers. The publication for to-morrow was now actually printed.

The Solicitor General hoped that he might be allowed to make the motion on Monday or Tuesday next.

The Lord Chancellor asked, why the application had not been made before this day?

The Solicitor General replied, that the case of Willoughby and Earl Grosvenor had unfortunately prevented his mentioning the case yesterday.

Mr. Shadwell remarked, that the publication had been allowed to continue for months without interruption.

The Lord Chancellor. The invariable practice had been in former times, that the Master of the Rolls had lent his assistance to the Lord Chancellor, when called away by other business. With respect to his predecessors in this office, such he knew to have been the constant practice. He had been yesterday obliged to leave the Court at two o'clock, and to-day he was also under the necessity of rising at the same hour. The Master of the Rolls, therefore, ought to sit from two o'clock until five for the dispatch of causes; but the nature of the business of the Court was such at the present day (appeals only being heard) that the Master of the Rolls had no jurisdiction. Other Chancellors had, however, this assistance almost every day in the year, and the hardship, therefore, was peculiarly great upon himself.

Mr. Horne thought the present motion could not be heard until the 4th Seal, which was to-morrow week.

The Lord Chancellor had no objection to that day being fixed, provided the proprietors of *The Lancet* under-

took not to publish these lectures in the mean time.

The Solicitor General pressed the hearing of the motion on an earlier day.

The Lord Chancellor. Mr. Solicitor, if I displace any case for the purpose of hearing this motion, I shall be very properly asked before I go to bed to-night, "What do you mean by not hearing appeals which are four or five years old?" If therefore any appeals are to be postponed by this motion I won't hear you.

The Solicitor General intimated, that another number of *The Lancet* would be published to-morrow.

The Lord Chancellor. If I am to hear this matter on the 4th Seal, the defendants must understand that they must not make use of any other *Lancet* (excepting that to be published to-morrow) until the motion is disposed of. Let us have no more bleeding until I have examined the patient myself, and decided upon his case.

Mr. Horne. No blood has yet been drawn.

The Lord Chancellor. I have heard of the publication of Medical Lectures, of Lectures on Astronomy, of Law Lectures, and other Lectures; and if a party chooses to take notes at these lectures for his own information, and afterwards publishes for his advantage, I think I shall make short work of it.

Mr. Horne. This case is not of the nature which your Lordship supposes.

The Solicitor General. Your Lordship's mind has caught the whole point in this case; and, in fact, there is nothing more to be decided. Your Lordship completely anticipates the decision.

Mr. Horne said, his Lordship could not decide a case he had never heard.

The motion was then directed to stand until the 4th Seal.

SATURDAY, DEC. 18.

The Affidavit of JOHN ABERNETHY, *filed,*

Saith, that, on Monday Evening the 4th day of October, 1824, deponent commenced the delivery of a course of lectures on the principles and practice of surgery, at the Theatre of Saint Bartholomew's Hospital, to the pupils of deponent, and to students and persons desirous of acquiring a knowledge of surgery, and who, previously to the commencement of the said intended course, had respectively been admitted by deponent as attendants upon such course, and had signed their names respectively in a book provided for that purpose, and had paid to deponent the fees for the privilege and permission of attending the same.

Saith, that said course of lectures was and is to consist of about thirty lectures, to be delivered, by deponent, on Monday and Wednesday Evenings in every week, to the said several persons then and there attending. And deponent has accordingly, from that time to the present, regularly delivered such lectures, and is still proceeding in manner aforesaid to the completion of the said course.

Saith, that the said lectures were and are delivered by deponent as from writings the property of deponent, composed by deponent, and which deponent has not as yet printed or published, and said lectures are the sentiments and language of deponent.

Saith, that he hath not authorised the publication thereof, or given such authority to any of the persons respectively attending the said lectures, or to any person or persons whatsoever.

Saith, that he intends to print and publish his said course of lectures.

Saith, that lectures have now, for a great number of years, been delivered by deponent, and by eminent persons his predecessors; and that, from the understanding and usage subsisting now, for a long space of time, between the lecturer and the persons attending the same, no publication of lectures has ever been made by the persons attending the same.

Saith, that, on the 9th day of October, 1824, was published a certain number, or part, of a progressive periodical work, published and to be published in numbers or parts, at the price of 6*d.* each, called The Lancet, and in which said work was described, as in the very words and figures thereof, in the name of deponent, the lecture which this deponent had so as aforesaid delivered on Monday Evening, October the 4th; and the said work held out to the public that it then gave, and that, from time to time, it would continue to give, deponent's said lecture and lectures with minute fidelity; and this number of The Lancet contained a notice or advertisement, that a lecture, on the principles and practice of surgery by deponent, would be published, in every succeeding number of The Lancet, until the course should be concluded;

and the said printed work contained, in a note to the said statement of deponent's said first lecture, a statement to the public in the words and figures, or to the purport or effect, following; that is say—" We should perhaps apologize to the distinguished lecturer, for the minute fidelity with which we have adhered to his peculiarities of diction. These peculiarities are, however, characteristic, and while they may recal to the student, and convey to the public, a more vivid idea of the manner in which Mr. Abernethy conveys oral instruction, they do not, in any degree, affect the sterling value of the matter. That we may not be misunderstood, however, on this point, we must observe, with regard to Mr. Abernethy's sustained compositions, and we allude more especially to his physiological works, that we know of no medical writer whose style is so distinguished for its purity and elegance. In this respect the contrast between Mr. Abernethy and his illustrious master, John Hunter, is as great as the intellectual resemblance between them is striking in more important particulars."

Saith, that a certain other number of the said work appeared on the 16th of October 1824, in like manner giving to the public the Lecture delivered by deponent in the previous week.

Saith, that he delivered his third Lecture on Monday evening the 11th day of October; and that, at that time, the circumstance of the publication of the first and second Lecture of Deponent, in manner aforesaid, had been communicated to deponent; and deponent took occasion, in the course of the delivery of the third or ensuing Lecture, to express, to the class assembled at the said theatre, his disapprobation of the said publication, and to protest against the same; and deponent believing, as the fact was and is, that deponent's said Lectures had been taken down in short-hand by some person or persons attending the said class, and afterwards published by or with the direction or consent of such persons or person, called upon such persons or person to avow himself. And deponent offered to return the money paid for attendance upon the said course, either there and then, or in any manner least offensive to the feelings of such persons or person; but no persons or person have, then or since, avowed themselves. And deponent collected the universal sense of the said class to be against the conduct of such persons or person in such publication.

Saith, that, on Saturday, October 23, was published a certain other number of The Lancet; and the same commenced and was headed as follows, "Surgical Lecture, delivered by Mr. Abernethy.—Theatre, Bartholomew's Hospital.—Lecture 3;" and then proceeded to give, as by this deponent personally, and verbatim, the Lecture delivered by deponent as aforesaid; and the said number also contained a statement, in the words and figures, or to the purport or effect following, proceeding, as deponent believes, upon the disapprobation so expressed by deponent in the course of said last mentioned Lecture, and introducing the same by the notice of a statement which had appeared in the *Morning Chronicle*, (that is to say), "Mr. Abernethy and The Lancet.—Out of regard to the just celebrity of Mr. Abernethy, we abstain from noticing the occurrence alluded to in the following statement, and certainly should not have in any way adverted to it, had not the affair found its way into the newspapers; it is scarcely fair that the consequences of a momentary irritation should be permitted to tarnish so well deserved a reputation as that attached to the name of Abernethy. We shall, therefore, content ourselves by merely placing before our readers the articles which appeared in *The Morning Chronicle*.——— Mr. Abernethy and The Lancet.—Several of the cheap weekly publications, which have recently issued from the press, have been principally directed to the diffusion of knowledge on scientific subjects. Among this number is The Lancet, which, commencing with reports of the most important and interesting parts of Sir Astley Cooper's Lectures, subsequently extended its plan, and gave a short abstract of the Lectures delivered by Mr. Abernethy, at the Theatre of St. Bartholomew's Hospital. This practice soon excited the attention of the pupils there, and seems to have been viewed with no favourable eye by the learned and eminent Lecturer himself. In the course of a Lecture delivered a few days since, Mr. Abernethy took occasion to advert to the circumstance of the publication of these abstracts, and made the following observations respecting it:—'I cannot 'prevent it, but it is very disagreeable 'to me, and at least it shall never be done 'with my sanction. If the hireling of 'The Lancet be present, I demand that 'he will step forward, and I shall be 'glad to return him his money. Perhaps I am wrong in supposing he will 'come forward here publicly, but if he 'will not, there is a private room in the 'house, and a servant will return him 'his money, or I shall be glad to do so 'at my own house. God forbid, Gentlemen, that I should wish to keep back

'from you any knowledge that I can be 'able to afford, or that you should not 'have an opportunity of reaping the full 'benefit of it. Take the substance of 'what I say; you are perfectly welcome 'to it—you have paid for it—it is yours; 'but I do protest that I think no one has 'a right to publish it to the world; I do 'not like it; and, certainly, he shall 'never have my sanction in so doing.' At the close of this appeal, the pupils, who all seem to entertain as strong a feeling on the subject as that expressed by their able and eloquent lecturer, manifested their opinion by loud applauses. —If we might offer any conjectures as to the cause of the offence taken at these publications, we should say, that it had arisen from the care with which the anecdotes employed to illustrate the subject, and to enliven the attention of the pupils, have been collected and published with all the marks of that colloquial manner almost necessarily incidental to extemporaneous delivery. In consequence of this publication, these have been criticised with undue severity, and foolishly held up as unbefitting the gravity of the professor's chair.—The right to publish these abstracts is certainly doubtful, but we believe the benefit arising from their publication to the medical men scattered over the country, to whom they convey information of the most recent discoveries and experiments, will admit of very little question. We should also be inclined to say, that the lecturer must reap some advantage from the desire which will necessarily be excited, in the readers of these publications, to possess his entire lectures, should he ever be disposed to give them to the world." And the said number of The Lancet, after setting forth the said extract from the Morning Chronicle, proceeded as follows: "To the Editor of the Morning Chronicle.—Mr. Editor, perceiving some inaccuracies in a statement which appeared in your journal of yesterday, headed 'Mr. Abernethy and The Lancet,' I feel the propriety of inserting a few observations in correction of them. In the first place, The Lancet is classed among the cheap weekly publications which have recently issued from the press.—Now, although with reference to its contents, I hope The Lancet is fairly entitled to be considered a cheap publication, it has certainly no claim to the distinction of being sold at a less price than any other medical journal, nor can it be classed with a description of publications from which essentially differs in character. Indeed it is quite clear that the writer of the article in your paper is wholly unacquainted with the nature of the work which he has attempted to characterize, for he proceeds to state, that, 'after commencing with reports of the most important and interesting parts of Sir Astley Cooper's lectures, it subsequently extended its plan, and gave a short abstract of the lectures delivered by Mr. Abernethy.' Upon this statement I have only to observe, that, so far from The Lancet confining itself to the most important parts of Sir Astley Cooper's lectures, those lectures have been reported with so much minuteness that one of the surgeons of St. Thomas's hospital has literally transcribed and published twelve of them under the immediate sanction of that honourable baronet. With respect to The Lancet having extended its plan by the publication of an abstract of Mr. Abernethy's surgical lectures, only two of these have yet been published; and so far from being an abstract, they were given with a minute fidelity of which the lecturer himself complained. I forbear making any remarks on the intemperate language which fell from Mr. Abernethy on a late occasion, because I am convinced that that gentleman, in common with his best friends, must lament, upon reflection, that he could have permitted himself to employ it. The application of the word 'hireling' to a body of gentlemen, who, in point of education, respectability, and general attainments, are, perhaps, in no respect inferior to Mr. Abernethy himself, manifests a degree of petulance ill suited to the dignity of the professor's chair; and if such an expression had been deliberately used, the gentlemen to whom it was addressed certainly were not the persons who would have been degraded by it. I am, Sir, your obedient servant, The Editor of the Lancet.—London, Oct. 16th."

That, on Saturday, 30th Oct. 1824, a certain other number of The Lancet was published, containing, as the first or leading article thereof, an article headed as follows, "Surgical Lectures delivered by Mr. Abernethy.—Theatre, St. Bartholomew's Hospital.—Lecture 4;" and, on Saturday, Nov. 6th, a certain other number was published, therein containing, as the first and leading article, an article entered and headed, "Surgical Lectures delivered by Mr. Abernethy.—Theatre, St. Bartholomew's Hospital. — Lecture 5;" and, on Saturday, Nov. 13th, 1824, was published a certain other number of The Lancet, the first or leading article of which was entitled "Surgical Lectures delivered by Mr. Abernethy.—Theatre, St. Bartholomew's Hospital.—Lecture 6;" and, on Saturday, Nov the 20th, was published a certain other number of The Lancet, the first or lead-

ing article of which was entitled "Surgical Lectures delivered by Mr. Abernethy.—Theatre, St. Bartholomew's Hospital.—Lecture 7th;" and, on Saturday, Nov. 27th, was published a certain other number of The Lancet, the first or leading article of which was entitled "Surgical Lectures delivered by Mr. Abernethy.—Theatre, St. Bartholomew's Hospital.—Lecture 8; and, on Saturday, Dec. 4th, was published a certain other number of The Lancet, the first or leading article of which was entitled "Surgical Lectures delivered by Mr. Abernethy.—Theatre, St. Bartholomew's Hospital.—Lecture 9;" and the said articles respectively profess to be verbatim publications of deponent's said lectures respectively, and are advertised as intended to be, from time to time, published in regular continuation.

That to all said numbers were annexed a notice stating that they were "printed and published by G. L. Hutchinson, at The Lancet Office, 210, Strand, London; where all communications to the Editor are requested to be addressed, post paid. This work is published at an early hour every Saturday morning;" and to the said numbers of the 6th, 13th, 20th, and 27th Nov. and 4th December was also annexed a similar notice, with the addition that they were published "at an early hour every Saturday morning, and sold by Knight and Lacey, Paternoster-row, and by all booksellers in the United Kingdom."

Saith, he is informed and believes, that said G. L. Hutchinson, John Knight and Henry Lacey, are jointly interested in the profits of said publication, and have received considerable sums in respect thereof, but what said person or persons are or is concerned in such publication deponent has been and is unable to discover.

That deponent hath not given to said G. L. Hutchinson and to said John Knight and Henry Lacey, or any or either of them, or to any other person or persons, any authority whatsoever to print or publish deponent's said lectures, either in whole or in part, or to use deponent's name, sentiments and language, any or either of them, in the manner in which they have already done in said several numbers or parts of said Lancet respectively; and threaten and intend to do in the future numbers or parts thereof.

That deponent alone has the property in the said lectures, and in the sentiments and language thereof; and that the copy or writings from which the same have been, and are in future to be, delivered, is and are the property of deponent. And deponent well hoped that said G. L. Hutchinson, John Knight and Henry Lacey, would have desisted from their publication thereof.

Mr. Hutchinson's Affidavit sets forth, That

Gilbert Linney Hutchinson of the Strand, in the county of Middlesex, one of the above named defendants, maketh oath and saith, That the said plaintiff, John Abernethy, hath been, as this deponent has been informed and verily believes, during the last twenty-five years and upwards, surgeon of Saint Bartholomew's Hospital; and that the said plaintiff hath, as this deponent believes, during all that time delivered lectures on the principles and practice of surgery in the theatre of such hospital, which theatre is, as this deponent verily believes, set apart by that establishment for the exclusive purpose of delivering lectures there; and this deponent saith, that although the said plaintiff hath delivered lectures in the said theatre for such space of time, yet he hath not, as deponent believes, heretofore published or printed the same; that no application has been made to this deponent to desist from the publication of the said lectures, although in the number of the said publication which contained the report of the first of the said lectures, a notice was given that the course of such lectures would be regularly given and published, and there are five thousand and upwards of the numbers containing such lectures now on hand.

And this deponent saith, That by the Charter of Incorporation of the Royal College of Surgeons in London, bearing date at Westminster the twenty-second day of March, in the fortieth year of the reign of his late Majesty King George the Third, after declaring, amongst other things, that whereas it was of great consequence to the commonwealth of this kingdom, that the art and science of surgery should be duly promoted, it is provided and declared, That it should be lawful to and for the said college thereby established and incorporated, from time to time, in manner hereinafter mentioned, to elect, choose and appoint, twenty-one persons to be the Court of Assistants of the said College, of which Court of Assistants ten persons

should at all times be constituted and appointed Examiners of Surgeons for the said college, and of such ten persons one should be principal master, and two others should be governors, to be respectively qualified and admitted in such manner and to continue in the said office respectively, for such time or times as in and by the said letters patent is therein ordered and appointed; and it should be lawful for the master and governors of the said college, or one of them, together with ten or more of the members of the said Court of Assistants for the time being, when and as often as to any of the masters or governors should seem meet, to hold courts and assemblies, in order to treat and consult about the rule, order, state and government of the said college; and also, that it should be lawful to and for the said master and governors, and Court of Assistants, so assembled, or the major part of them, to make, ordain, confirm, annul or revoke, from time to time, such bye laws, ordinances, rules and constitutions, as to them should seem requisite and convenient for the regulation, government and advantage of the said college, so as such bye laws, ordinances, rules and constitutions be not contrary to law, and in all such cases as should be necessary to be examined, approved of, and altered, as by the laws and statutes of the realm is provided and required; and, by the said letters patent, it is further declared, that after the date thereof no person, except as therein is excepted, should be capable of being a member of the said college, unless he should have obtained letters testimonial of his qualification to practise the art and science of surgery, under the common seal of the college thereof established; but every person who should thereafter obtain such testimonials under the common seal of the college aforesaid, should thereby, by virtue of such letters testimonial, become and be constituted members of the said college, subject to all the regulations, provisions and bye laws of the said college; and it is by the said charter further declared, that no court or courts for the examination of any person or persons, touching their skill in surgery, shall ever be held but in the presence of the master or one of the governors, and five of the members, at least, of the Court of Examiners of the said college thereby established and incorporated as aforesaid.

And this deponent further saith, that the said plaintiff hath been, as deponent verily believes, for several years last past, and now is, one of the council or court of assistants, and also one of the examiners of the said College of Surgeons.

And this deponent saith, he hath been informed, and believes that, on or about the nineteenth day of March last past, the said court of examiners of such college (of which court of examiners the said plaintiff is one) made and ordained the bye laws, rules or regulations following, that is to say, "Royal College of Surgeons in London. The court of examiners, in pursuance of their duty to promote the cultivation of sound chirurgical knowledge, and to discountenance practices which have a contrary tendency, have resolved that, from and after the date hereof, the only schools of surgery recognized by the court, be London, Dublin, Edinburgh, Glasgow and Aberdeen; that certificates of attendance upon the chirurgical practice of a hospital be not received by the court, unless such hospital be in one of the above recognized schools, and shall contain on an average one hundred patients; and that certificates of attendance at lectures on anatomy, physiology, the theory and practice of surgery, and of the performance of dissections, be not received by the court except from the appointed professors of anatomy and surgery in the Universities of Dublin, Edinburgh, Glasgow and Aberdeen, or from persons teaching in a school, acknowledged by the medical establishment of one of the recognized hospitals, or from persons being physicians or surgeons to any of those hospitals."

And this deponent saith, that candidates for the diploma of the said college of surgeons are, as deponent verily believes, required to produce, prior to examination by the said court of examiners, certificates, first, of having been engaged six years at least in the acquisition of professional knowledge; second, of being twenty-two years of age, and according to

the above resolutions; third, of having regularly attended three winter courses, at least, of anatomical lectures, and also one or more winter course of chirurgical lectures; fourth, of having performed dissections during two or more succeeding winter courses; fifth, and of having diligently attended during the term of, at least, one year to the chirurgical practice of a hospital.

And this deponent saith, that such candidates are, by the regulation of the said college, required to produce certificates of actual attendance on surgical lectures.

And this deponent saith, he hath been informed, and verily believes, that the said hospital, called St. Bartholomew's Hospital, is one of the hospitals so recognized by the said college of surgeons, as in the said bye laws mentioned, and that the only certificates of attendance upon distinct lectures delivered in London upon the principles and practice of surgery recognized and received by the said college of surgeons, are the certificates of the hospital surgeons themselves.

And this deponent saith, he hath also been informed and believes, that the theatre in which the said plaintiff delivered his said lectures, is a part of the foundation of St. Bartholomew's Hospital, under the control of the Governors thereof, and which theatre is used for the exclusive purpose of delivering lectures by the surgeons or other persons professors, appointed from time to time to deliver lectures there.

And this deponent saith, That the surgeons and lecturers for the time being of such hospital are, as deponent believes, appointed by the Governors of the said hospital.

And this deponent further saith, that the predecessors of the said plaintiff, surgeons in such hospital, as deponent hath been informed and believes, have been accustomed to deliver lectures in the said theatre, but that such persons have not, as this deponent verily believes, ever published the lectures so delivered by them, nor ever insisted upon an exclusive right to or property in the same.

And this deponent saith, that no stipulation or condition has ever, as deponent believes, been made or imposed by the said plaintiff, or by his predecessors, in the office of surgeon or lecturer of such hospital, upon the admission of students to attendance upon such lectures, as to the manner in which they the said students should make use of the knowledge or information acquired at the said theatre.

And this deponent saith, that the principles inculcated and delivered by the said plaintiff in such lectures, are not, as this deponent believes, new principles originating with the said plaintiff, but are substantially the same principles and practices of surgery as were originally promulgated by the late surgeon John Hunter, and others, as will appear by a comparison of such lectures with the publications and works of the said John Hunter.

And this deponent saith, that the said lectures delivered by the said plaintiff as aforesaid, have been delivered extemporaneously, and were not read from any papers or other writing at the time of the delivery thereof, and that the said lectures are, as deponent believes, illustrations of the principles of surgery, as laid down by him, the said John Hunter, and others, for the most part derived by the said plaintiff from cases in the performance of his duty as a surgeon in the said hospital.

And this deponent further saith, he hath been informed and believes, that prior to the publication of the third lecture in the said periodical work, he, the said plaintiff, did make some remarks to the students in the said theatre of the said hospital, expressive of his disapprobation of the publication of the said lectures, as mentioned in the affidavit of the said plaintiff, and that the said plaintiff did then and there state and declare that he believed he could not prevent it, or to that or the like effect.

And this deponent saith, he hath been informed, and verily believes, that, on Monday the twenty-fifth day of October last, and also on Wednesday the twenty-eighth day of the said month, the lamps in the said theatre were put out and extinguished, as deponent believes, for the purpose of preventing the possibility of taking notes at such lectures, and that con-

sequently the lectures delivered on those evenings were published without any written notes thereof having been taken in the said theatre.

And this deponent saith, that the surgical lectures delivered by Sir Astley Paston Cooper, bart. at St. Thomas's hospital, having been published in the said periodical work, he the said Sir Astley Cooper, on the eighth day of March last, as this deponent was informed and believes, expressed himself to the following effect: "although the publication of my lectures exposes me to the critical ordeal of my professional brethren, yet I fear it not; I care not who may be made acquainted with the doctrines I advance, the instructions I give, the principles I inculcate, while in this theatre—if they cannot withstand the test of criticism, they are unfit for your guidance, and ought to be exploded. Facts, and inevitable conclusions arising from those facts, compose these lectures; therefore I am perfectly indifferent as to who publishes them, and equally indifferent who may be made acquainted with them, for I am positive they cannot be refuted. I am well aware that I shall be assailed by the abuse of scoundrels; that envy, disappointed malice, and foul ingratitude, will endeavour to vilify my name; but, Gentlemen, such base and puny efforts are beneath the serious consideration of an honourable mind, and I shall continue to treat them, as I have ever done, with scorn and contempt." And the said Sir Astley Cooper, after making some observations upon the publication of hospital cases, further said, "with regard to my lectures, the case is different. I have a duty to perform in this theatre, and I have no objection for the whole world to be made acquainted with the manner in which it is discharged;" or words to that or the like effect.

G. L. HUTCHINSON.

Sworn at the Public Office, Southampton Buildings, this 16th day of December 1824, before me,

SAM. C. COX.

The Solicitor General. My Lord, in a case in which Abernethy is the plaintiff, and Hutchinson and others are the defendants, I am humbly to move your Lordship for an Injunction to restrain the defendants from publishing or printing the Lectures which have been delivered, or are to be delivered, by the plaintiff, and also from reprinting and republishing the surgical lectures delivered by the plaintiff, in a publication called *The Lancet*.

My Lord, when this case was formerly moved, on a motion of which notice was given to the other side, it was then stated, in consequence of giving that notice of motion, that I was not entitled to make the motion ex parte, which I otherwise should have done. And the motion then stood over, in order that the defendants might make an affidavit, which affidavit they have made. My Lord, the gentlemen who are the defendants, are Mr. Hutchinson, Mr. Knight, and Mr Lacey; and those gentlemen, I understand, are publishers, and keep a bookseller's shop for the sale of works of this description, and, I believe, works of a periodical nature in general. It is not necessary I should state that to your Lordship, except for the purpose of reminding your Lordship that these gentlemen, who keep this bookseller's shop, are not the persons to whom this gentleman attaches any medical skill; they are merely, I believe, the publishers, and the publishers only; but those gentlemen have thought it right, from time to time, to publish, professing to publish, a book entitled The Lancet.

The Lord Chancellor. Have you got one of these Lancets here?

[Some of the numbers were handed up to his Lordship.]

The Solicitor General. Professing to be, my Lord, a verbatim statement or publication of Mr. Abernethy's lectures. My Lord, that work it is sought, by the injunction which is prayed for by my motion, to restrain.

My Lord, Mr. Abernethy, in support of his bill, has filed an affidavit, which it will be necessary for me to state to your Lordship. My Lord, he says, in that affidavit, that, on the 4th of October 1824, he the deponent, commenced the delivery of a course of lectures, on the principles and practice of surgery, at the Theatre of Bartholomew's Hospital, to the pupils of deponent, and students and persons desirous of acquiring a knowledge of surgery; and who, previously to the

commencement of the intended course, have respectively been admitted by deponent, as attendants upon such course, and signed their names respectively in a book provided for that purpose, and had paid to deponent, the fees for the privilege and permission of attending the same. It then states, that the course of lectures was and is to consist of about thirty lectures, to be delivered by deponent, on Monday and Wednesday evenings in every week, to the several persons then and there attending; and deponent has accordingly, from that time to the present, regularly delivered such lectures, and is still proceeding in the same manner to the completion of the course. That the lectures were, and are delivered by deponent, as from writings, the property of deponent, composed by deponent, and which deponent has not as yet printed or published, and the lectures are the sentiments and language of deponent. That he has not authorized the publication thereof, or given such authority to any of the persons respectively attending the lectures, or any person or persons whatsoever. That he intends to print and publish his said course of lectures. It then states, that lectures have now, for a great number of years, been delivered by deponent, and by eminent persons his predecessors; and that, from the understanding and usage subsisting now, and for a long space of time, between the lecturer and the persons attending the same, no publication of lectures has been ever made by the persons attending the same. My Lord, then the affidavit states, that, on the 9th of October, 1824, was published a certain number or part of a progressive periodical work published, and to be published in numbers or parts, at the price of sixpence each, called The Lancet; and in which work was described, as in the very words and figures thereof, in the name of deponent, the lecture which deponent had so as aforesaid delivered on Monday evening, October the 4th; and the work held out to the public, that it then gave, and that it would, from time to time, continue to give, deponent's lecture and lectures with minute fidelity; and this number of The Lancet contained a notice or advertisement, that a lecture on the principles and practice of surgery, by the deponent, would be published in every succeeding number of The Lancet, until the course should be concluded: and the work contained, in a note to the statement of deponent's first lecture, a statement to the public, in the words and figures, or to the purport and effect following, that is to say, "We should perhaps apologize to the distinguished lecturer, for the minute fidelity with which we have adhered to his peculiarities of diction; these peculiarites are, however, characteristic; and while they may recal to the student, and convey to the public, a more vivid idea of the manner in which Mr. Abernethey convey: oral instruction, they do not in any degree affect the sterling value of the matter. That we may not be misunderstood, however, on this point, we must observe with regard to Mr. Abernethy's sustained compositions, and we allude more especially to his physiological works, that we know of no medical writer whose style is so distinguished for its purity and elegance. In this respect, the contrast between Mr. Abernethy and his illustrious Master, John Hunter, is as great as the intellectual resemblance between them is striking in more important particulars."

My Lord, then the affidavit states, that a certain other number of the said work appeared on the 16th of October, 1824, in like manner giving to the public, the lecture delivered by deponent, in the previous week. Then it states, that he delivered his third lecture on Monday evening, the 11th day of October, and that, at that time, the circumstance of the publication of the first and second lectures of deponent, in manner aforesaid, had been communicated to deponent; and deponent took occasion, in the course of the delivery of the third or ensuing lecture, to express to the class assembled at the theatre his disapprobation of the publication, and to protest against the same; and deponent believing, as the fact was and is, that deponent's lecture had been taken down in short-hand, by some person or persons attending the class, and afterwards published by, or with the direction or consent of such person or

persons, called upon such persons or person to avow himself, and deponent offered to return the money paid for attendance upon the course, either there and then, or in any manner least offensive to the feelings of such persons or person; but no person or persons have since avowed themselves, and deponent collected the universal sense of the class to be against the conduct of such person or persons in such publication.

My Lord, then the affidavit states, that, on Saturday, October the 23d, was published a certain other number of The Lancet, and the same commenced and was headed as follows: "Surgical Lecture delivered by Mr. Abernethy.—Theatre, Saint Bartholomew's Hospital.—Lecture 3d;" and then proceeded to give, as by deponent personally, and verbatim, the lecture delivered by deponent as aforesaid; and the number also contained a statement in the words and figures, or to the purport and effect following; proceeding, as deponent believes, upon the disapprobation expressed by deponent in the course of the last mentioned lecture, and introducing the same by the notice of a statement which appeared in the Morning Chronicle, that is to say: "Mr. Abernethy and The Lancet.—Out of regard to the just celebrity of Mr. Abernethy, we abstain from noticing the occurrence alluded to in the following statement, and certainly should not have in any way adverted to it had not the affair found its way into the newspapers; it is scarcely fair that the consequences of a momentary irritation should be permitted to tarnish so well deserved a reputation as that attached to the name of Abernethy; we shall, therefore, content ourselves by merely placing before our readers the articles which appeared in the Morning Chronicle. 'Mr. Abernethy and the Lancet.—Several of the cheap publications, which have recently issued from the press, have been principally directed to the diffusion of knowledge on scientific subjects. Among this number is The Lancet, which, commencing with reports of the most important and interesting parts of Sir Astley Cooper's lectures, subsequently extended its plan, and gave a short abstract of the lectures delivered by Mr. Abernethy, at the Theatre of Saint Bartholomew's Hospital. This practice soon excited the attention of the pupils there, and seems to have been viewed with no favourable eye by the learned and eminent lecturer himself. In the course of a lecture delivered a few days ago, Mr. Abernethy took occasion to advert to the circumstance of the publication of these abstracts, and made the following observations respecting it.—I can't prevent it; but it is very disagreeable to me, and at least it shall never be done with my consent. If the hireling of The Lancet is present, I demand that he will step forward and I shall be glad to return him his money; perhaps I am wrong in supposing he will come forward here publicly, but if he will not, there is a private room in the house and a servant will return him his money, or I shall be glad to do it at my own house. God forbid, gentlemen, that I should wish to keep back from you any knowledge that I can be able to afford, or that you should not have an opportunity of reaping the full benefit of it; take the substance of what I say; you are perfectly welcome—you have paid for it—it is yours; but I do protest, that I think no one has a right to publish it to the world. I do not like it, and certainly he shall never have my sanction in so doing."

(Here The Solicitor General requested Mr. Rose to state the rest of the affidavit, who proceeded to do so accordingly.)

Mr. Rose. My Lord, it goes on to say, that, "At the close of this appeal, the pupils, who all seemed to entertain as strong a feeling on the subject, as that expressed by their able and eloquent lecturer, manifested their opinion by loud applauses. If we might offer any conjecture as to the cause of the offence taken at these publications, we should say that it had arisen from the care with which the anecdotes employed to illustrate the subject, and to enliven the attention of the pupils, have been collected and published, with all the marks of the colloquial manner almost necessarily incidental to extemporaneous delivery. In consequence of this publication, these have been criticised with

undue severity, and foolishly held up as unbefitting the gravity of the professor's chair. The right to publish these abstracts is certainly doubtful, but we believe the benefit arising from their publication to the medical men scattered over the country, to whom they convey information of the most recent discoveries and experiments, will admit of very little question. We should also be inclined to say, that the lecturer must reap some advantage from the desire which will necessarily be excited in the readers of these publications to possess his entire lectures, should he ever be disposed to give them to the world." And this number of The Lancet, after setting forth the extract from the Morning Chronicle, proceeded as follows:—"To the Editor of the Morning Chronicle.—Mr. Editor, perceiving some inaccuracies in a statement which appeared in your journal of yesterday, headed 'Mr. Abernethy and The Lancet,' I feel the propriety of inserting a few observations in correction of them. In the first place, The Lancet is classed among the cheap publications which have recently issued from the press. Now, although with reference to its contents, I hope The Lancet is fairly entitled to be considered a cheap publication, it has certainly no claim to the distinction of being sold at a less price than any other medical journal, nor can it be classed with a description of publications from which it essentially differs in character. Indeed it is quite clear that the writer of the article in your paper is wholly unacquainted with the nature of the work which he has attempted to characterize, for he proceeds to state, that 'after commencing with reports of the most important and interesting parts of Sir Astley Cooper's lectures, it subsequently extended its plan, and gave a short abstract of the lectures delivered by Mr. Abernethy.' Upon this statement I have only to observe, that so far from The Lancet confining itself to the most important parts of Sir Astley Cooper's lectures, these lectures have been reported with so much minuteness, that one of the surgeons of St. Thomas's Hospital has literally transcribed and published twelve of them under the immediate sanction of that honourable Baronet. With respect to The Lancet having extended its plan by the publication of an abstract of Mr. Abernethy's surgical lectures, only two of these have yet been published; and so far from being an abstract, they were given with a minute fidelity of which the lecturer himself complained. I forbear making any remarks on the intemperate language which fell from Mr. Abernethy on a late occasion, because I am convinced that that Gentleman, in common with his best friends, must lament, upon reflection, that he could have permitted himself to employ it. The application of the word 'hireling' to a body of Gentlemen, who, in point of education, respectability, and general attainments, are, perhaps, in no respect inferior to Mr. Abernethy himself, manifests a degree of petulence ill suited to the professor's chair; and if such an expression had been deliberately used, the gentlemen to whom it was addressed certainly were not the persons who would have been degraded by it. I am, Sir, your obedient servant, the Editor of The Lancet.—October 16th."

The affidavit then goes on to state, my Lord, that, on Saturday the 20th of October, 1824, a certain number of The Lancet was published, containing, as the first or leading article thereof, an article headed as follows, "Surgical Lectures delivered by Mr. Abernethy.—Theatre, St. Bartholomew's Hospital."

The affidavit, my Lord, then goes through all the continuing lectures, purporting to be the lectures delivered by Mr. Abernethy; and then it proceeds to state, That to all said numbers were annexed a notice stating that they were "printed and published by G. L. Hutchinson, at The Lancet Office, 210, Strand, London; where all communications to the Editor are requested to be addressed (post paid.) This work is published at an early hour every Saturday morning;" and to the numbers of the 6th, 13th 20th, and 27th of November, and the 4th of December, were also annexed a similar notice, with the addition, that they were published at an early hour every Saturday morning, "and sold by Knight and Lacey, Paternoster

Row, and by all Booksellers in the United Kingdom."—That he is informed, and believes, that G. L. Hutchinson, John Knight & Henry Lacey, are jointly interested in the profits of the publication, and have received considerable sums in respect thereof; but what other person or persons are or is concerned in such publication, deponent has been, and is, unable to discover. That deponent hath not given to G. L. Hutchinson, or to John Knight and Henry Lacey, or any or either of them, or to any other person or persons, any authority whatsoever to print or publish deponent's lectures, either in whole or in part, or to use deponent's name, sentiments, and language, any or either of them, in the manner in which they have already done in the several numbers or parts of The Lancet respectively, and threaten they intend to do in the future numbers or parts thereof.—That deponent alone has the property in the lectures, and in the sentiments and language thereof; and that the copy or writings from which the same have been, and are in future to be delivered, is and are the property of deponent. And deponent well hoped that G. L. Hutchinson, John Knight and Henry Lacey, would have desisted from the publication thereof.

The Solicitor General. My Lord, this motion, I am willing to admit, was intended to have been moved *exparte*, on the ground that the law was clear; and, as it struck my humble apprehension, so clear, at least, as to be incapable of being the subject of any doubt that a lecturer in a surgical theatre, or a professor in a university, or a learned divine preaching a course of sermons in the pulpit in the different churches of this country, had that proprietary right in the subject of his lecture or his sermon, on the basis of which he might call on a court of equity to say, that no man should, without his consent, publish those dissertations. And, my lord, that proposition appeared to me then, and does now appear to me, to be so clear as to be free from doubt. I need not, however, embrace this case with the case of a sermon delivered from the pulpit in a place of worship, but confine it to the case of a lecturer in a theatre of anatomy, or with the case of a professor delivering a lecture in a university; and that proposition appears to me, as a matter of law, to be so clear and so plain, as that, if I had had the honour of moving the case *exparte*, I should have so presumed to state the law, and should then only have referred your Lordship to the affidavit of Mr. Abernethy, in which he negatives, in the most distinct terms, having given permission either to a pupil, or to any other person frequenting the theatre, or to any person whatsoever, to make the publication; and I should have contented myself on that short statement, on which I should have presumed to ask your Lordship to grant the Injunction.

My Lord, this case, however, not having been moved *exparte*, but notice having been given of it, it was stated, by my learned friends on the other side, that it would be necessary for them to read our affidavit, which I have taken the liberty of requesting, with your Lordship's permission, to have read at length, not having the good fortune, in all the parts, to be able to read the different passages myself, either through my own momentary imperfections or the irregularity of the writing, but which, nevertheless, it was fit should be read to your Lordship; and, my Lord, it having been read, the substance of it is what I before stated to your Lordship, namely, a general denial either of a general permission to the students, or a particular permission to any one student—a general denial of any right in any person whatever to publish those lectures.

My Lord, however, it was said, the motion not having been made *exparte*, that the other side had a right, according to the rules and practice of this Court, and although it is not the universal rule, yet undoubtedly it is very common, when a motion which might be made *exparte* is moved on notice, that the notice puts the moving party into the situation that he ought not to be heard until those who have notice can also be heard on the subject. In consequence of that, my friends on the other side—the backers and supporters of this Lancet, required time to put in an affidavit. My Lord, I have read that affidavit; and I must say, that ever since I have had the honour of

practising in this Court, I never saw an affidavit which was of so little use. Indeed I hardly know how to describe its nullity: it is an affidavit full of vacuity, and replete with nothing. And, if it were possible to introduce a negative term which would make nothing *plus* than nothing, that would be the term by which I should describe this affidavit.

The *Lord Chancellor*. I should like to know what sort of negative you call that?

The *Solicitor General*. My Lord, on this ground I take the liberty, with very great deference, if your Lordship will permit me, under all these circumstances, of saying I admit that *exparte* applications are sometimes extended too far, and there are occasions sometimes on which the whole of a case cannot be so brought before the Court, on an *exparte* application, as to render it safe for the Court to act; and there are other cases in which I apprehend the facts, on which those applications are founded, may be made so clear as that this Court ought not to entertain any hesitation or difficulty in acting on an *exparte* application, that is where, upon the facts of the case as they are disclosed in the affidavit, on which the motion is made, the Court thinks there is a competent case furnished. And, I must say, I think the affidavit of Mr. Abernethy, on this subject, was not only that competent case, but that full case to which nothing could be added. Because when a man applies to a court of equity for an injunction, contending that his work has been violated and published without his leave, to that affidavit there can be added nothing more, when he denies having given either general leave to any class or body of men, or particular leave to any precise or particular individual, so to publish. Therefore Mr. Abernethy's negative of the supposed possibility of a right or title in any other person—to that there can be added nothing.

Then, my Lord, comes this affidavit, which I call a sheet of blank paper, the matter of which has no more reference to the case than if they had put on the files of this court four or five folios of paper unblotted by ink. That is the whole substance of this affidavit. If I could fancy that the paper now lying before me, instead of being interpolated by hand-writing, which, by the way, is rather better written than the affidavit which I have lying on my side of the table—if I could suppose, instead of casting my eye on words and letters, I were casting my eye on a blank, superfluous piece of paper, unblotted with so much ink, just so much would be the value of this affidavit, this professed production of important matter, which this matter stood over to allow my learned friends to produce. We supposed there was something to be produced, either in law or in fact, the production of which required an affidavit to be filed; but instead of which there comes this thing called an affidavit, which consists of nothing more than four sheets of paper, professed, undoubtedly, to be written on; but, although professed to be written on, containing not one syllable which, so far as this affidavit is concerned, gives any right to have the motion stand over.

My Lord, this affidavit of Messrs. Hutchinson, Knight and Lacey, with respect to whom I have nothing further to add than what I before stated, namely, I apprehend I have correctly said, these gentlemen have nothing to do with the medical skill; they are the publishers, and the publishers alone, and I wish them to have the advantage of that circumstance in their favour; I claiming the advantage of it also in my favour, as far as it is in my favour, and I need not to that part of the case add any thing more. They make an affidavit in which they tell us a truism, which mankind do not want to have announced upon an affidavit. They are very benevolent in this, which I call a superfluous and unnecessary, and I may add nugatory, affidavit, which tells us nothing; for they merely tell us, that Saint Bartholomew's hospital is a public institution, and that in that place distinguished eminent members of the faculty have, from time to time, delivered lectures.

My Lord, they tell us, therefore, I say, a truism, the announcement of which to the public made it necessary that the matter should stand over. Therefore, I suppose, it stood over,

among other things, that they might tell us Saint Bartholomew's hospital was a public institution, and that eminent medical men were in the habit of communicating lectures there. The next thing is, that his late Majesty in his paternal and benevolent disposition, in supporting and furthering the interests of all institutions in this country which relate to arts and sciences, and for ameliorating and improving the arts and sciences of this country, had granted a charter of incorporation to the Royal College of Surgeons in London And they further tell us, that Mr. Abernethy is one of the council of the court of assistants, and that he is also one of the examiners of the College of Surgeons. And they then tell us, for no other purpose than that of wasting so much paper, that this Institution and College of Surgeons has made various bye-laws with respect to the admission of young gentlemen to the faculty, and that they are to attend lectures at different places—in London, Edinburgh, and other large and distinguished schools of medicine in this country; and that, having done so, they are to procure their certificates before they can be admitted to the practice of surgeons in London. My Lord, this important truth occupies, I think, about two sheets more of this affidavit.

We then come, my Lord, to another statement equally important as the other, namely, that the predecessors of Mr. Abernethy in the medical chair, at Saint Bartholomew's hospital, have not been in the habit of printing their lectures. And I believe, as far as those facts are concerned, they might have spared themselves the trouble of letting the motion stand over for that purpose; and that they ought not to have had the opportunity of printing another intervening number of The Lancet, for the purpose of idle and absurd gasconade.

My Lord, these are the truths, the damning truths, which were to be produced in this not yet made affidavit, which is to subvert Mr. Abernethy's title to his lectures.

Then, my Lord, the affidavit-maker, with the same solemnity of allegation, the same importance of statement and the same frivolity, as far as matter of good sense or argument is concerned, proceeds next to inform us that he has been informed, and believes, that, prior to the publication of the third lecture in the said periodical work, the plaintiff did make some remarks to the students, in the theatre of the hospital, expressive of his disapprobation of the publication of the lectures, as mentioned in the affidavit of the plaintiff; and that the plaintiff did, then and there, state and declare that he believed he could not prevent it, or to that or the like effect.

Now, my Lord, I suppose the reasoning part of this affidavit is this—and that these parts of it are merely put upon the record, in order to make the sham semblance of an affidavit, or, if I may so express it, the mask and visage of an affidavit, which applies to all the parts I have referred to—I suppose the argument is, that if a gentleman, in a public lecture-room, remonstrates against the publication of his lectures, and complains to his students of a breach of faith, and tells them, if they suppose they have a right to publish his lectures, they may take back their pupil's fee again, and not violate the faith on which the students enter the room—that if an eminent member of the faculty, not perhaps so eminent a lawyer as a surgeon, should happen, at the moment, not to know that the law of the land would give him a right to prevent the publication, and he expresses his doubts on the subject, and on the reasoning and good sense of the thing. I suppose this affidavit is filed for the purpose of showing that, because Mr. Abernethy has expressed that doubt in the lecture-room, he is to be told afterwards, in the Court of Chancery, that he has no right to prevent the publication of The Lancet, because, at the moment when he made that observation, he had not acquired such a general knowledge of the law of England, as to know that it would give him a right to apply to a Court of Equity on the subject.

My Lord, having called your Lordship's attention, I believe, to the unimportant parts of this affidavit, I will now call your Lordship's attention to the *important part*. And the important part of it is this; as to the doubt expressed by this gentleman, whether he could or not prevent the publication of these lectures. Now, the way

in which your Lordship is called on to act is, you are to tell Mr. Abernethy that he has no right at all, not because in the lecture-room he has not read his lectures, but because he has brought into the lecture-room some diction which had not before been brought into the lecture-room; and therefore his is not a case in which he is entitled to an injunction to restrain them from printing and publishing his lectures.

Then, my Lord, the last passage in this affidavit is this; that another very eminent man of the faculty, whose name we all know very well, namely, Sir Astley Cooper, that he has delivered lectures in different places, and that, when he has delivered them, he has not prevented the publication of them, and not claimed the copyright in them; that when he has delivered his dissertations, he has not prevented their being published.

My Lord, this is the affidavit for which the question was ordered to stand over: and it having stood over, I shall not, as my mind remains the same on the subject as it was before, trouble your Lordship with any discussion on the law of the case, or trouble your Lordship with any discussion on the facts of the case. As to the facts of the case, they are all on one side, and with respect to the law of the case, I submit to your Lordship, that a gentleman in a public chair has, by law, a right to prevent the publication of his lectures when he makes an affidavit negativing any permission either to a student or to any other person to make this publication. The motion was ordered to stand over, that some supposed fact might be brought forward on the subject, and when the supposed case on the opposite side is brought forward, it is not pretended that a syllable of Mr. Abernethy's affidavit is not correct, for it is not asserted or insinuated.

The Lord Chancellor. Hand me up the bill and Mr. Abernethy's affidavit.

The Solicitor-General. It is not asserted or insinuated, that licence or permission, either directly or indirectly, has ever been given, or is intended to be given, to any gentleman of the medical profession attending there, or to any person of any description whatever, to publish his Lectures.

My Lord, having stated this, I have closed my case; and, my Lord, I should think I was under a very great error indeed if I were to trouble your Lordship with any further discussion on the subject; for, I apprehend, without making an affidavit, it is enough to ask, if a public Lecturer has no property in his Lectures, how was it that Doctor White published his celebrated Lectures delivered in Saint Mary's pulpit, as soon as that learned divine came into this country, and what he would have said, if, as soon as his first Lecture had come out, there had come out an ecclesiastical Lancet, not a medical Lancet, and published these Lectures; and as soon as another learned divine, whose compositions are not to be excelled, undoubtedly, in the English language, I mean the late Doctor Paley, as soon as he had read one of his Sermons, as he was lecturing in the adjoining room, some skilful note-taker (I won't say the Editor of The Lancet) the next morning had published his Lecture. And then, again, with respect to Sir William Blackstone, who was so popular when the University of Oxford recognized your Lordship as one of its students, as soon as that eminent man had delivered one of his Lectures in the University School, there had come out, either from the canonical press or some other press, a verbatim copy of his dissertations? And I may apply the same remark to Lectures delivered from the Professor's chair in the several Universities in this country—in the University of Edinburgh, and all those established Universities in which public Lectures have been delivered on various occasions, established on different foundations—some by charter, and others by the other means in which lectures of this sort are constituted.

My Lord, I need not add too, that independent of the public character in which a lecturer stands, (for it is not material to distinguish between the case of what is called a public lecturer, so termed, and a private individual who delivers lectures to a private class,)—I must say, however, as the law stands, that a private *lecturer*, who *delivers lectures* in a *private room*, to a private class, has *no property* in those lectures; but a *public lecturer*,

who delivers publicly lectures, either by royal appointment, as filling one of the public chairs as a professor in the universities, or that of a lecturer or professor appointed by charter, under a public institution, in those various institutions which are, from time to time, established in this country *has*.

My Lord, as I am as much at a loss to know on what grounds the *legal* difficulty is to be raised on this subject as I was before at a loss to know what difficulty, in point of *fact*, could be raised on the subject, I shall content myself with saying, that, whatever may have been the feeling which operated on the minds of those who produced this publication, I shall discuss it in this short way, on the general principle of law, and I will suppose that nothing was intended personally offensive, or personally ill-natured, or personally injurious to Mr. Abernethy. —I am so content to put it, and I should be glad so to put it; and, having so put it, I shall conclude my humble address to your Lordship, by asking for the injunction on that general principle which I have alluded to; and, under all these circumstances, I hope your Lordship will see no difficulty in the case, as there never has been any difficulty in the case. I do not blame any person for bringing into the field any argument or any fact, which is at all material, before they are bound by any order, or by the injunction of this Court; but yet I must take the liberty of complaining, on this occasion at least, that persons, who contend they ought to have an opportunity of making an affidavit on the subject, ought not so to contend without a belief that they have some defence to make in that affidavit; and when they do it for the purpose of imposing on this Court, in order to obtain the advantage of *publishing another number* of *The Lancet*; for their object in gaining time, to put an affidavit on the files of the Court which they knew would not operate as a defence against the case, was to have an opportunity of going on violating Mr. Abernethy's right, and treating with contempt this Court, shamming that they had a defence, in order to get the opportunity of publishing another number of this work.

Mr. Rose. My Lord, I am on the same side with my learned friend the Solicitor General, in support of this application; and certainly I only regret, with my learned friend, that this case was allowed to stand over, for we certainly felt a difficulty (which we always feel when your Lordship is pleased to throw out an observation) when your Lordship threw out the observation, that from the nature of the case you should make short work of it.

Mr. Horne. That has not prejudiced the case at all.

Mr. Rose. No, I know it has not. My Lord, the case on the part of the defendants is now no better than it was when we attempted to bring it on before, for it is now precisely the same though more detailed in terms, yet it is the same point: it is an application on the same circumstances as were before the Court when the application was to have been made exparte, and when that observation, which I have alluded to, fell from the Court.

My Lord, the bill on which we are making this application, calls on the defendants for an account of the profits arising from the publication of a periodical work, called The Lancet, as far as Mr. Abernethy's lectures are concerned in that work; and it also seeks for an injunction to restrain them from the publication of that work. Both these questions referring themselves to this point, undoubtedly, whether or not, with regard to the account that is sought by the decree or the injunction that is now asked of your Lordship by this motion, the plaintiff has a property in the subject matter of his complaint. My Lord, the question, therefore, to be considered is, whether or not, in the bill, the plaintiff so puts his case as to raise the question, either that he has property in the sentiments and language delivered by him, or in the written copy as from which he states to your Lordship, in his affidavit, he delivered those sentiments and language; and if, my Lord, he has that property which he submits he has, the defendants cannot infringe on it by reason of any right of publication given to them, it being admitted, on all sides, that nothing in the shape of an assignment of the copyright has passed from him to them.

My Lord, however it is but justice, to the very eminent plaintiff for whom I appear on this occasion, to say, that as far as the question depends on the matter of account, although in their affidavit in answer to ours they have stated the sale of the work in question to have been to a very extensive amount (for I think

they have already published to the extent of five thousand numbers), although the profit, therefore, might be considered as no contemptible thing, it is no principle of that kind on which the learned lecturer now seeks your Lordship's assistance; he disavows any such principle, and he stands before your Lordship simply in the vindication of that principle on which, in the discharge of his duty as a lecturer between himself and his pupils, and in coincidence with what your Lordship will find on the whole of the publication, and which almost every other eminent man alike enlightened in his pursuits wishes to know—whether, on the hitherto understood usage, as arising out of the contract between them and their pupils, whom they are to instruct on subjects of such useful information, and who attend them for the purpose of obtaining that information, the information which they receive is to be sent forth to the public without allowing the opportunity of putting it in a shape which is to give the sentiments and language of Mr. Abernethy the character which Mr. Abernethy's sustained composition has. It is upon that principle, my Lord, that the present complaint is made to your Lordship, that principle going to the property which this lecturer has, taking it either as an extempore lecture or a lecture founded on a written copy. And it is upon that principle that we now ask your Lordship to grant the Injunction to restrain the defendant from publishing this unauthorized publication.

My Lord, it would be idle in me to trouble your Lordship with a dissertation on any of the cases which may be brought forward with respect to the law on literary property; for that point I take to have been so long and so well understood, independent of the common-law right, and so long acted on by your Lordship, that I apprehend it would be but a waste of time to trouble your Lordship on that subject. My Lord, your Lordship, in referring to the great case, on this subject, of Millar and Taylor, which is reported in Burrows, will find the result at least was brought to this, however much difference of opinion there was on the Bench as to the property which an author might have in a work after publication, it never was doubted that before publication he had a right to the property in his language and ideas, always attending to the fact which was to stamp on that language and those ideas the character of identity, so as to protect it from invasion. And it is equally well understood also, I conceive, from the very long train of reasoning which was raised in that case, that a man has a property in his language and ideas. And I might add, as a further proposition, under the common law also, that the exercise of a man's intellect would give, and ought to give, him a title to the property in the ideas and sentiments which he has acquired from his own industry, as applied to that which is the subject of property; and the only difficulty attending the argument of that great and eminent lawyer, on the question of literary property (I mean Mr. Justice Yates), in that case, was in fixing on the language and ideas such identity as that the person complaining might be able to say to the vendor of that language and ideas, "You are dealing with that which I characterize as my property," speaking independently of its corporeal existence as property, or its recognized existence as property. That was the only difficulty which Mr. Justice Yates entertained in that case, whether the author of that language and ideas was authorized in saying to the vendor of them, "These are mine; you are dealing with my language and ideas, and dealing with them purporting to be my language and ideas."

That observation, my Lord, goes to that part of the case on which the plaintiff raises on his bill this question, and with respect to which (independent of the reduction of the subject matter of the Lecture into a written composition, and independent of the delivery of it as from a written composition) he gets rid of that difficulty which is thrown on him as to his language and ideas wanting identification to characterize them as his property, from the particular manner in which the defendants in this case have dealt with that language and ideas, and from the evidence furnished by themselves, for they admit they are dealing verbatim, nay, even following the words to the very letter, and are dealing with the very sentiments which this eloquent lecturer has delivered. It is with his very language and ideas they admit they have clothed themselves.

My Lord, then we get rid of this proposition, which is a proposition that is attended certainly with difficulty, and which in this case it will be unnecessary to touch upon, and that was the only difficulty which attached, and which was in the way of Mr. Justice Yates, in the case to which I have alluded—namely, that it was too uncertain to say, that the language adopted by one was the language used by the other. But, my Lord, in this case we are removed from any difficulty of that kind, because we have only to put into the hands of my Lord Chancellor, the affidavit which the case stood over for the purpose of allowing

them an opportunity of filing, and to call the attention of the Court to their advertisement, which will at once put an end to the question arising on the identity of the property—the subject matter of property itself. In the argument of Mr. Justice Yates, he put it in this way—"Ideas are free, but while the author confines them to his own study, they are like birds in a cage, which none but him can have a right to let fly; for, till he thinks proper to emancipate them, they are under his own dominion." Now, in all the cases put by the learned Judge, he did not anticipate the rapidity with which the operation of the press almost instantaneously extends the circulation of knowledge, or he would not have so put it. He did not, perhaps, recollect that a short-hand writer might have been present catching the ideas as they escaped from the mouth, and that in the course of an hour from the time of his leaving the Lecture Room, all those ideas, both the little ones and their dams, might be carried to the public press, and, in a very short time, circulated all over the country. What, my Lord, would that learned Judge have said had he seen the fowler, instead of waiting for the liberty of the birds, entrapping the ideas at the very mouth of the cage, nay, invading Mr. Abernethy's aviary, and, without sham e or remorse, taking the birds and all their little chickens at one swoop?

My Lord, in this case we identify the existence of the very w ords and figures, for that is admitted fro m the manner in which it is put on th e affidavit. Your Lordship will see on there was a notice fro the third Lecture Lancet, couched in m the Editor of the observe on this part terms (and I must ing from the peculia of the case), showof that advertiseme rity of the language orrect knowledge nt, that there was a c rsons, that they on the part of these pe Lectures of Mr were so dealing with there is not one . Abernethy, because the does not affo rd me the very argumen And, I mus dressing to your Lordship.e coolness o f this advertisement, if to throfound ant hors of some thing for the difference allow en studie d and sustained compositions, s to the exigency of an unstudied addres appeal Court, that the impudence of this adver to the public which is put on this says tisement will give it. My Lord, he the , in a notice which is subjoined to the advertisement, that a Lecture on y principles and practice of surgery, be Mr. Abernethy, and a Lecture on th principles and practice of medicine, by Doctor Armstrong, will be publis hed in every succee ding number of The Lancet, until each course is concluded.

Then, my Lord, Mr. Abernethy in his affidavit says, that on the 9th of October, 1824, there was published a certain number or part, of a progressive periodical work, published, or to be published in numbers or parts, at the price of sixpence each, called The Lancet, and in which said work was described, as in the very words and figures thereof, in the name of deponent, the lecture which deponent had so as aforesaid delivered on Monday evening, October the 4th; and the said work held out to the public, that it then gave, and that from time to time it would continue to give, the deponent's said lecture and lectures, "with the minute fidelity with which we have adhered to his peculiarities of diction; these peculiarites are, however, characteristic, and while they may recal to the student, and convey to the public, a more vivid idea of the manner in which Mr. Abernethy conveys oral instruction, they do not in any degree affect the sterling value of the matter: that we may not be misunderstood however on this point, we must observe, with regard to Mr. Abernethy's sustained compositions, and we allude more especially to his physiological works, that we know of no medical writer whose style is so distinguished for its purity and elegance; in this respect, the contrast between Mr. Abernethy and his illustrious master, John Hunter, is as great as the intellectual resemblance between them is striking in more important particulars."

My Lord, I shall not go through all the cases which there are on this subject, but there are one or two which I will simply mention to your Lordship. Your Lordship will bear in mind what is here stated with respect to Mr. Abernethy, as to his vivid ideas, and his peculiarities of diction, and the character of his sustained composition, and when your Lordship's attention is called to an observation made by my Lord Chief Justice Mansfield, in that great case to which I have alluded, your Lordship will see how I apply his observation to the present case. My Lord, there was a subsequent advertisement in another publication, which after noticing an article in the Morning Chronicle, in which that newspaper professed to give a statement of some difference that had occurred between Mr. Abernethy and the Reporter of his lectures, and which, it will occur to every body conversant with the mode of dealing with

things which take place on any public occasion, is merely a report of what had taken place on an occasion of a delivery of his lectures, and that mode of dealing with his lectures Mr. Abernethy never complained of, and never will. My Lord, however, having done that, The Lancet proceeds in this way, after stating the observations of the Chronicle, and noticing Mr. Abernethy's appeal to the pupils, it goes on to say, "At the close of this appeal, the pupils, who all seemed to entertain as strong a feeling on the subject as that expressed by their able and eloquent lecturer, manifested their opinion by loud applauses; and if we might offer any conjectures as to the cause of the offence taken at these publications, we should say, that it had arisen from the care with which the anecdotes employed to illustrate the subject, and to enliven the attention of the pupils, have been collected and published, with all the marks of the colloquial manner almost necessarily incidental to extemporaneous delivery. In consequence of this publication, these have been criticised with undue severity, and foolishly held up as unbefitting the gravity of the professor's chair. The right to publish these abstracts is certainly doubtful, but we believe the benefit arising from the publication to the medical men scattered over the country, to whom they convey information of the most recent discoveries and experiments will admit of very little question: we should also be inclined to say, that the lecturer must reap some advantage from the desire which will necessarily be excited in the readers of these publications to possess his entire lectures, should he ever be disposed to give them to the world." And the said number of The Lancet, after setting forth the extract from the Morning Chronicle, proceeded as follows: (so that the Morning Chronicle adopts this affidavit—your Lordship will find the paper which has been handed up to your Lordship, (the Lancet itself contains this article.) "To the Editor of the Morning Chronicle.—Mr. Editor, perceiving some inaccuracies in a statement which appeared in your journal of yesterday, headed, 'Mr. Abernethy and The Lancet,' I feel the propriety of inserting a few observations in correction of them. In the first place, The Lancet is classed among the cheap publications which have recently issued from the press, now; although with reference to its contents I hope The Lancet is fairly entitled to be considered a cheap publication, it has certainly no claim to the distinction of being sold at a less price than any other medical journal, nor can it be classed with a description of publications from which it essentially differs in character. Indeed, it is quite clear that the writer of the article in your paper is wholly unacquainted with the nature of the work he has attempted to characterise; for he proceeds to state, that after commencing with reports of the most important and interesting parts of Sir Astley Cooper's Lectures, it subsequently extended its plan, and gave a short abstract of the Lectures delivered by Mr. Abernethy." Upon this statement I have only to observe, that so far from The Lancet confining itself to the most important parts of Sir Astley Cooper's Lectures, these Lectures have been reported with so much minuteness that one of the surgeons of St. Thomas's Hospital has literally transcribed and published twelve of them under the immediate sanction of that honourable Baronet. With respect to The Lancet having extended its plan by the publication of an abstract of Mr. Abernethy's Surgical Lectures, only two of these have yet been published, and so far from being abstracts, they were given with a minute fidelity of which the Lecturer himself complained.

So that your Lordship sees here Mr. Abernethy, on his part, never withdraws himself from the fair exercise of criticism properly applied to his works, and the editor of The Lancet puts a vindication on his mode of dealing with works of this nature; for he is offended at the public being told they are merely extracts or reports of his Lectures, and in order to correct that, he will have it said that they are given verbatim, and with the minute fidelity with which they profess to give them.

My Lord, that is Mr. Abernethy's complaint, that they are short-hand writer's notes—that some short-hand writer has been present and reported his Lectures just as they fell from his mouth. That is the way in which the plaintiff puts his case, and I submit to your Lordship, both from the record and the statement on their part, there can be no doubt that they have adopted precisely the same language as Mr. Abernethy. There cannot be the least doubt on that subject; and, therefore, I submit to your Lordship that Mr. Abernethy has a right to come to this Court, and to call on your Lordship for reparation. Your Lordship knows the improvement to which short-hand writing is brought; they are enabled to transfer from the mouth of the lecturer the very words which are the subject of discourse just the same as if the lecturer himself had

previously reduced it into writing. And, my Lord, I apprehend upon the law of the subject, it is quite clear that there is such a property in the subject matter of the Lecture as the law will protect, and that the party is entitled to call on this Court to interfere and prevent the publication of it, there being no doubt as to the identification.

Then, my Lord, on the first part of the bill, which raises the abstract proposition as to these being mere ideas alone, we submit, that although they may exist incorporeally, and merely in language and ideas unembodied and unfit for use, still they fasten on the jurisdiction of the Court independent of the question on the statute of Anne, as that law existed and was administered in this Court long before that statute was introduced; and that, my Lord, disposes of that part of the case.

My Lord, the next part of the case which this learned lecturer has stated in his affidavit is, that these lectures are delivered as from a written composition, his property, which he has neither published himself, nor authorized the publication of by any person whatever. And that, my Lord, brings itself to a very short point, though it does not certainly convey what the learned lecturer does not wish to convey to your Lordship, namely, he professed to state every word that was given in writing. What he professes (not meaning to convey more) undoubtedly is, that the subject matter of the lecture exists in a composition reduced into writing subject to those additions and illustrations which may apply to the question during the course of his oral delivery. And I apprehend it is quite clear, my Lord, that that part of the subject is brought within the cases which have long been recognized in this Court. My Lord, what he says is: that he has it so reduced into writing as to give him a special property—that special property not involving a right in any one else to publish it to the world, and I apprehend it will be unnecessary to trouble your Lordship with all the cases in which that doctrine has been held in this Court. There is a very strong case upon the subject, your Lordship knows, of Dr. Paley's Sermons; those were sermons which were orally delivered in his life-time for the purpose of public instruction in an open church, which was accessible by every body, and yet the Court restrained the publication of those sermons. There are many other cases which I can refer your Lordship to; there is the case of my Lord Chesterfield's Letters, and the case of my Lord Chesterfield was simply this; on the death of Mr. Stanhope, his widow possessed herself of the letters from Lord Chesterfield to him, some of which were letters of a public nature, and others of a private nature; and after the death of her husband, she went to Lord Chesterfield and gave him up the whole of the letters which were of a private nature, but kept the public ones. It appeared, however, that she had kept a copy of the letters which were of a private nature, and published the whole; and, accordingly, an injunction was applied for and publication was restrained, and undoubtedly that is a very strong case. Then, my Lord, there is the case of Pope and Curl, and the case of Macklin and Richardson, which your Lordship will find in Ambler's Reports, and that, my Lord, was an injunction to restrain the publication of a Magazine.

The Lord Chancellor. That case which you are now citing was the case, I think, of a written composition, when somebody attended at the Theatre at which it was delivered, and took down the words of the actors as they were given. And the question there was, whether that could be published?—Was not there a case in this Court a little while ago in which one of the Theatres, either Covent Garden or Drury Lane, filed a bill for an injunction against another Theatre over the water, where they had a short-hand writer to take down what was performed on the boards of either Covent Garden or Drury Lane, and then acted it at that Theatre on the other side of the water, and the King's Bench held that to be legal. I think that was held to be legal. I think so. Whether you have heard of that case or not I do not know.

Mr. Rose. The way in which the Court of King's Bench considered that, was this: that was an action for penalties, and they would not have allowed them if there had been evidence of the publication, and to that extent alone the Court of King's Bench dealt with it. That was an action for penalties: there was no question of property there; the way in which they dealt with it was,—this, they said, we cannot suffer.

Mr. Horne. There is a late case in the fifth Term Reports.

The Lord Chancellor. There is Mr. Elliston's case also. I should be glad to see that case over the water.

Mr. Rose. That was the case of the Surrey Theatre.

The Lord Chancellor. No, I think it was the Coburg.

Mr. Rose. There was a case in which Mr. Elliston was concerned in a drama called Theresa, but I don't know what has become of that.

The Lord Chancellor. There was the judgment of the King's Bench upon it, I think.

Mr. Shadwell. In Mr. Elliston's case your Lordship, when you gave your judgment, directed a case to be sent to the Court of King's Bench, and the question there was, whether or no, as Lord Byron had published it in the way it had been acted at Mr. Elliston's Theatre, they were at liberty to act it; for the fact was, it had been a little abridged, a little altered.

Mr. Rose. I know there was another case in this Court in which Mr. Elliston was concerned, but what became of it I don't know: I don't know whether there exists any report of it. I thought your Lordship was adverting to that case.

The Lord Chancellor. I take it that the very case you are alluding to is reported in some of the late reports.

Mr. Horne. It was very lately before your Lordship.

Mr. Rose. I have not been able to find that case reported any where.

The Lord Chancellor. I am sure it is reported somewhere.

Mr. Rose. Very likely it is, but I have not been able to find it.

The Lord Chancellor. You must look for it.

Mr. Rose. I recollect perfectly the discussion which took place on that case, but I quite forget in what manner it was disposed of.

Mr. Horne. That was a case in which Mr. Elliston complained of the other side having taken the bones, marrow and all.

Mr. Rose. However, my Lord, the way in which I deal with the two heads of this Bill are, first looking at it as existing incorporeally as a lecture delivered by Mr. Abernethy, the identity of which is admitted by the present publication, and then I call upon your Lordship to deal with that part of the Bill which applies to the question of the lecture being delivered as from a written composition, which is spoken to decidedly in our affidavit, and which is not contradicted by their affidavit further than they state that the lectures are delivered extemporaneously, and it will be for them to get rid of the statement in our affidavit that they were delivered as from a written composition.

Then, my Lord, that being so, I submit to your Lordship, upon the cases which have been decided, if the fact exists that they are delivered from a copy, it is quite clear that there is such a property in them as the law will protect.

My Lord, I shall, therefore, leave that part of the case, and deal with the other part of it, which is this: whether or not a person who has become a member of Mr. Abernethy's lecture-room is entitled to say, that he has the right of publishing his lectures? Now, on reference to that subject, I find that, as against a person having a property in that which exists in sentiments and language, in order to raise the intention of publication, the *onus* is not on the person claiming the property, but on the person seeking to invade it; and if it can be shown, from the nature of the contract between Mr. Abernethy and the persons attending the lecture-room, that they have a right beyond mere attendance for the purpose of improvement—beyond their right of taking notes of the lectures for their own use and improvement or practice; and that it was a contract implied between him and them, that, if they thought fit—if any person thought fit, he might at once publish them to the world, it is not for Mr. Abernethy to recede from the terms of any such contract; but I call on them to show they had such a right at the time they entered into their engagement with Mr. Abernethy. My Lord, as far as Mr. Abernethy's expression of intention can go, it is given to your Lordship in the manner in which, on the third lecture, it has been stated to your Lordship; and it was addressed to those who heard him; and if there had been a right in them so to deal with the property, it was unheard of, at least, at that time, for he distinctly told the assembled pupils,——

The Lord Chancellor. The first question is—the first question is, whether an oral lecture is within the protection of the law? That is the first question. Now, as far as my recollection goes, that has not yet been the subject of determination. There has not yet been any decision on that subject. On the other hand, if there be a lecture apparently oral, but which is, nevertheless, delivered, by the assistance of a very good memory, from a written composition, which may be the case, or, at least, it is said to be so with respect to extempore sermons, the question then will be, if it could not be made out in point of law, that an oral lecture, or an oral sermon was within the protection of the law, whether that protection is due to the written composition? Another question will be, whether this Court would interfere before notice had been given that that oral composition—that that apparently oral lecture, was orally the delivery of a matter from a written composition, before notice? And another question will be, whether, if the oral

lecture is to be protected by the fact, that it is delivered, though apparently oral, yet it is, in truth, the delivery of a written composition? whether those who insist that that circumstance gives the protection of the law to that lecture which appears to be orally delivered? whether it is not on them to produce and show that written composition, in order to make out their case? I used, the other day, certainly, *language* which, perhaps, it was a little *too hasty for me, as a Judge, to use;* but yet I do not repent of the doctrine which I then stated; for I have no conception in the world but that the lectures of Professor White, and the other persons whose names have been mentioned, are compositions which have the full protection of the law: I have no doubt about that.

Mr. Rose. My Lord, I have now stated to your Lordship the different points which are raised on the pleadings, and I shall conclude my address to your Lordship by observing, with respect to the existence of a written copy, that I am not aware the difficulty has ever existed in any case where a party coming for an injunction on a written copy, that the party has been required to produce the written copy itself; it has always been taken on the affidavit when it has been stated that it was so, and the Court has given that protection to the plaintiff which he was entitled to. I was, however, proceeding to address your Lordship in this view of the case, that, taking it on either of the propositions which have been submitted to your Lordship, the plaintiff is entitled to the protection which he seeks, namely, to restrain the publication of this work, and the question is, whether or not they can contend that we have in any manner given them the right of publication. I apprehend it will not be disputed that we have the property in the subject matter of the publication, and unless they can show that they have acquired the right of publication which we possessed, we are entitled to the protection of this Court.

My Lord, we have likewise addressed to your Lordship, as we conceive, looking at the mode in which this right is recognized in some of the cases, that if your Lordship is satisfied on the affidavit that there is a *prima facie* property in the plaintiff from the facts which he presents to your Lordship, it is on the defendants who claim the right to invade that to show to your Lordship that they had the authority of the plaintiff for that purpose; and if we concede to them, that the case is made out as far as the property in the subject matter of complaint goes, yet it lies on them to show that, as against the plaintiff, the right is in them. Now as far as that right is to be collected from intention or usage, that question is affirmatively with us, for it is not pretended, during the number of years since lectures on arts and sciences began to exist, that there has been an invasion on the property in the lectures so delivered by the lecturer. And it is admitted here from the earliest time of this institution, with respect to the lectures delivered on this particular subject and at this particular place, it never has been understood, or at least acted on, that the lectures which were there delivered could be given to the public. That appears, my Lord, from what is expressed by the lecturer himself, for it appears by the affidavit that he expressly mentioned that in delivering his lectures, and which was ratified by the unanimous assent of the assembled pupils to whom he made his appeal, and was not dissented from by any person to whom he so expressed himself. As soon as this eloquent lecturer found his property had been invaded by the publication of The Lancet, he immediately took the opportunity to protest against it in the strong terms, and I must say with reference to that subject in the appropriate language, which he used on that occasion.

My Lord, I have now, I believe, stated all the points on which we conceive we are entitled to the injunction which we pray. I will, however, just add this circumstance: it is stated in the affidavit that Sir Astley Cooper sanctioned the publication of his lectures; now, my Lord, so far from that, Sir Astley Cooper wishes to vindicate the purity of his own language by the publication of his own works. My Lord, since this case was on before, they have thought fit to put into this publication (most improperly certainly) that your Lordship was perfectly justified (alluding to what took place on the former action) in saying, you would make short work of the business.

Mr. *Horne.* What are you referring to? There has been no publication to-day!

Mr. *Rose.* Yes, there has; I hold it in my hand.

Mr. *Horne.* That is not part of Mr. Abernethy's lectures. I submit, my Lord, this is a very unfair mode of dealing; what has that to do with the case? It may be very convenient for Mr. Abernethy to go out of the case.

Mr. *Rose.* When this was on before, and when they undertook not to publish without your Lordship's leave, I certainly think they have been a little stepping

out of their line of duty, although I admit they have not given Mr. Abernethy's lectures, yet they have been writing on the subject on which his lectures depend; there is not the least doubt about that.

Mr. *Horne.* You have no right to state that; it is improper to state it, because it is not verified by an affidavit, and if it were verified by an affidavit, it is totally irrelevant to the matter in question before your Lordship.

Mr. *Rose.* In my judgment it is proper to state it, and I shall state it as part of my observations.

Mr. *Horne.* Then my Lord Chancellor will understand me, as counsel for the defendant, as objecting to it. There is no such book.

Mr. *Rose.* I say there is such a book; and it will be found on all the books, and on this also, that the defendant here puts himself forth, on the principle of holding out what he calls the established rules of this hospital, in order to protect himself against his standing forth as the champion for the students and surgeons. And in that way the defence is presented to your Lordship.

My Lord, I shall now leave this case, with reading to your Lordship that observation which I alluded to in the course of the argument, namely, the mode in which my Lord Mansfield deals with the case, if the party, against whom the publication is made, publishes without allowing the author the opportunity which he himself ought to have of giving to the world what the defendant calls his sustained composition. Your Lordship, taking it upon the bill and affidavit, that he does intend to publish and give to the world himself the lectures, which are thus slovenly and in their undressed state given to the public. My Lord, what my Lord Mansfield says is this (and the whole of this argument is addressed on the common-law right independent of the statute), he says it is just that an author should reap the pecuniary profits of his own ingenuity and labour. It is just that another should not use his name without his consent. It is fit that he should judge when to publish, or whether he will publish. It is fit he should not only choose the time but the manner of publication: how many; what volume; what print. It is fit he should choose to whose care he will trust the accuracy and correctness of the impression. To whose honesty he will confide not to foist in additions; with other reasons of the same effect. I allow them sufficient to show, "it is agreeable to the principle of right and wrong; the fitness of things, convenience and policy, and, therefore, to the common law, to protect the copy before publication. But the same reasons hold after the author has published; he is to reap no pecuniary profit, if the next moment after his work comes out it may be printed upon worse paper and in worse print, and at a cheaper rate. The eighth of Anne is no answer. We are considering the common law upon principles before and independent of that act. The author may not only be deprived of any profit, but lose the expense he has been at. He is no more master of his own name. He has no control over the correctness of his own work. He cannot prevent additions."

The Lord Chancellor. I take that law to be extremely clear, because decisions have made it so, which I should call a better thing than any opinion of mine. I take it to be extremely clear, that if a man have composed a written work, though he may have conversed about the subject and so on, that he may certainly maintain an action and have an injunction against any body pirating that written work; but I want to know with respect to the first point that is raised in the case, which is this: Whether, if a person of great ability addresses, in a colloquial way, or extempore, what is called a lecture—whether the law has ever decided that the publication of that is illegal, if there be no copy or writing from which, in truth, that was delivered, if it appears to be a lecture merely extemporaneously delivered. I want to know, whether there is any case that has ever decided that. Or whether the law is this: that if I, to-day, for instance, were, to the best of my power, to deliver a lecture any where on the different estates that a man may have in hand—whether I can say, that that shall be protected on the principle of the cases which have been decided, because it may happen, possibly, that twenty years hence my memory may be correct enough to publish that lecture. There never has been such a decision that I know of.

Mr. Rose. I have certainly not been able to find such a decision, my Lord.

The Lord Chancellor. If this gentleman will write a composition, and then deliver it orally—

The Solicitor General. We don't like so to lecture; we like to deliver our lectures orally, and not in writing.

The Lord Chancellor. The question I suppose that will be made about that is, whether the Court has not a right to examine the accuracy with which it was stated, by seeing the copy in writing. The ordinary course of proceeding in all these matters of injunction is, to produce the

original, and then produce the other, in order to see whether they correspond. You are not now on the question of what is decent and what is right, but you are entirely on the question of law. I do not mean to intimate any opinion now, because that would be wrong, but I am only anxious that the nature of the question brought before the Court should not be misunderstood.

Mr. Rose. The first question that is raised on the bill is, whether there is any property in an orally delivered lecture, and that is a new question certainly: I do not find any decision on that subject. I have already submitted my observations to the Court on that part of the case, and upon the evidence given by the defendant himself, with respect to the ideas and sentiments contained in this publication being the very language which was used by the plaintiff himself, and therefore, with respect to the question of identity, we have established that beyond all doubt. The next question which arises on the bill, is that these lectures were delivered as from a writing, and your Lordship will observe, that the way in which they meet that on their affidavit is this: they say that the said lectures delivered by the said plaintiff as aforesaid have been so delivered extemporaneously, and were not read from any paper or other writing at the time of the delivery thereof, and that the said lectures are, as the deponent believes, illustrations of the principles of surgery, as laid down by him the said John Hunter, and others, for the most part derived by the said plaintiff, from cases in the performance of his duty as a surgeon in the Hospital; so that they put it as appropriation of learning derived from others who had practised in the Hospital, and therefore they leave that part of the case to a certain extent uncontradicted.

My Lord, I shall close what I was about to state to your Lordship with the language of my Lord Mansfield, in this very extensive case in Burrows, which is better than using my own language. My Lord, after going on to the extent I have already read, he goes on to say, "any one may print, pirate, and perpetuate imperfections, to the disgrace and against the will of the author; may propagate sentiments under his name which he disapproves, repents, and is ashamed of. He can exercise no discretion as to the manner in which, or the person by whom his work will be published. For these and many more reasons, it seems to me to be just and fit to protect the copy after publication."

Now, my Lord, I have nothing more to submit to your Lordship, except, that on the general view of the case, we submit we are entitled to the protection of the Court, from that which appears, on the evidence before the Court, to vest the property resulting from the intellectual talent of the plaintiff in him.

Mr. Horne then proceeded to address the Court, on the part of the defendant, as follows:

My Lord, I am of counsel for the defendants in this case, and I cannot help thinking that, on reflection, it will be a matter of very great satisfaction to the eminent plaintiff by whom this bill has been filed, and some satisfaction, I trust, to your Lordship, in this case, to see, after the arguments of my learned friends, that the complaint which is now made, has not in any respect a tendency to diminish the just eminence of the plaintiff, or to hold up that distinguished person to ridicule, or his professional skill to ridicule, or his character to ridicule, or that it is in any degree defamatory of him. My Lord, that, I apprehend, must be a matter of just satisfaction to him. For, I apprehend, quite the contrary must necessarily be inferred from the very gravamen of the case, if such I can call the case which this eminent plaintiff has been advised to put upon the record. For, as I understand the gravamen of the case, it is not that there is any misrepresentation, or any improper motive with respect to the just representations of such a person, and, I must add, to his credit; for it is perfectly clear, that what he complains of is the very minute fidelity with which his lectures are handed to the public, through the medium of the press. Now, I apprehend, therefore, knowing the just eminence of the plaintiff, and his great skill in his profession, and his great science in his profession, that the necessary consequences, independent of the motives which are ascribed to the author of this work—the necessary consequences of this publication must be to extend, if it were necessary, the fame of the plaintiff, instead of that fame being confined, however widely it may be diffused among professional men and those patients who place themselves under his care—that it will un-

doubtedly have the effect of extending that justly earned reputation throughout the community at large. That must be the necessary tendency of the general diffusion of this work; and, I apprehend, not only the necessary tendency, but the actual tendency, of the publication of the work; and it is impossible to ascribe to the gentleman, whosever publication this may be, any other object than that of more generally diffusing the circulation of the justly-earned fame of the plaintiff.

My Lord, I put out of the question for the moment that which, I hope, is not intended to be denied to the defendants (for I apprehend it cannot) that, at the time they are doing justice to the plaintiff and to the cause of surgical knowledge and science, by publishing this work for the benefit of the public in general, they are, at the same time, doing that which I apprehend every man is permitted in this country to do, and by doing which he may earn a fair profit to himself. And the question then will be, whether he is, or not, entitled to the fairly-earned profit which this publication has hitherto brought, and which I hope it still will continue to bring. My learned friend, the Solicitor General, has been pleased, certainly, to cast some very extraordinary epithets on the affidavit of my client, for he concluded his observations on that part of the case by imputing that which I am sure he meant to impute only through the vehemence of the moment and not deliberately, namely, that, when the motion was first made, time was asked by us, not for the purpose of a real defence but for the purpose of a sham defence to be made by affidavit. Now, I can only say that, if that be matter of just imputation, it is matter of just imputation which is to be cast on myself and my learned friend whose assistance I have in this case. For your Lordship, I dare say, recollects enough of this case to bear in mind that, when this motion was first attempted to be brought on, it was the day after the bill was filed, and the day after the affidavit had been filed in support of the bill. And, to be sure, if this question be not quite a matter of course, if it be a question of any importance to the parties, and if it be a question (as my learned friend the Solicitor-General has put it) of still greater importance to the public, I think the counsel for the defendants should hardly care for any censure which may be attempted to be cast on them by my learned friends, or whatever my learned friends may think of them, if in such a case they ask time to do justice to their client, and themselves, and the public at large. With respect to the affidavit, my learned friend the Solicitor-General has treated it in a most extraordinary way; though, I think, my learned friend has quite contradicted himself with respect to what he stated to your Lordship on that part of the case, and I can only account for his treating the affidavit in the way he did in order to laugh it out of Court; for, to use the same very happy expression that he did, but which he could not apply to every part of it—he said—it was "full of vacuity, and replete with nothing." And yet, my Lord, this affidavit, which my learned friend the Solicitor General says is full of vacuity and replete with nothing—this mask and visage of an affidavit, as he calls it, is that which engrossed the greatest portion of my learned friend's argument; and, after arguing on it for some time, he then told your Lordship it would be very desirable, nay, after he had characterised this affidavit as an absolute nothing, it would be very desirable to know whether the term "*plus* than nothing" might not be applied to this affidavit, just to use such a term. Now my learned friend will forgive me for saying, on this affidavit also which he calls *plus* than nothing—he will allow me, in my argument, to say, that his argument and speech on this *plus* than nothing of an affidavit has undoubtedly been the *ne plus* of nothing. It appeared, however, in the progress of my learned friend's argument and eloquence, in his better judgment, that deeper reflection upon the case, as he went on, induced him to state to your Lordship, in contradiction of this nothingness of an affidavit, that there were important parts in the affidavit. And after my learned friend, Mr. Shadwell, and myself had supposed he had concluded his observations on this *plus* than nothing of an affidavit,

he said, "Now having made these observations on that part of the affidavit which goes for nothing, and which is quite irrelevant, and is a mere sham defence, I will now call your Lordship's attention (for I have got his words) to the *important parts* of the affidavit." So that here is an affidavit which my learned friend thinks proper to characterise as an affidavit full of nothing, and which he has held up to your Lordship as being in itself a matter of just ridicule with respect to the parties who use it in their defence, and which he chooses to characterise a sham defence, for the purpose of being able to give to this the character of an unjust publication; and yet, after applying to it all those terms of vituperation which are so familiar to him, he then says he will call your Lordship's attention to the *important parts* of the affidavit. Now I agree with my learned friend the Solicitor-General, that there are some parts of this affidavit which are unimportant, not because they go into a great deal of extraneous matter, but because the defendants being here to oppose this motion, not on an answer, but on an affidavit, it is absolutely necessary, undoubtedly, that what they have to state to your Lordship, through their counsel, should be stated to your Lordship, not on the imagination of counsel, but from the instructions of their client, which they have thought proper to have embodied into an affidavit; and it was for that reason, and that only, that the few facts which are put into the affidavit were so stated to your Lordship, instead of being stated to your Lordship by the counsel at the bar. My learned friend Mr. Rose has indulged more in a logical argument, and, to be sure, in such a case as this, in which matters of surgery and so on are concerned, I was very much struck certainly with his mode of arguing the case, and with the logical manner in which my learned friend treated it. He compared us to birds of a cage, and said, that we were assisting Mr. Abernethy's birds of a cage to make out a case; he said we had come and stolen all his birds—all the young ones and their dams. That is the eloquent and poetical term which my learned friend Mr. Rose thinks right to give to this matter, which is a subject of surgery.—My Lord, having made these observations on this part of the case, I shall not waste your Lordship's time by saying more on this part of the case. And now I come, with your Lordship's permission, to what appears to me to be a matter of very great importance to the parties, and of still greater importance to the public, and which I apprehend is really the case between the parties, and which real case, as it appears to me, both my learned friends have studiously wished to withdraw from your Lordship's attention. It occurred to me, the very moment when I heard your Lordship ask for the bill and affidavit, that your Lordship could not fail very shortly to see what the real case was between the parties, and that which your Lordship was good enough to throw out is really the very case, and the ground on which we humbly conceive this case must turn. Now, I think, it will not be denied by my learned friend, that if Mr. Abernethy, the plaintiff, has the right which he contends for in this case, it is on the ground of private authorship, that is, he must make out that he is the author of a certain work, and that, as the author of a certain work, he has the copyright in it, and that we have infringed on that copyright: and, if he does that, then that he has a right at law is clear, and not only that he has a right at law is clear, but that, under the circumstances of this case, he has a further right, namely in equity a right to enjoy the publication which he now seeks to restrain by injunction. Your Lordship knows full well, in the case of an injunction, it by no means follows as a necessary consequence on the assertion of a legal right, however clear that legal right may be, that the party who stands on his legal right has a right to come to this Court for an injunction, but that he must, at the same time, be able to superadd to it the equitable right to call on this Court for an injunction. And whenever a defendant can make out that the plaintiff has been guilty of laches or neglect, or has been sleeping on his rights after good notice, that, in very many cases, and I think I may state as a general proposition in all

cases, it has been considered an answer to the plaintiff's bill. It is so in the case of an injunction for a patent, which is very much similar to this, and it is an every day's argument, and an argument that is always used whenever it can be made out, in point of fact, that a party has been sleeping on his rights, that he is not entitled to come to this Court for relief, unless he come in good time.

Now, on the question, therefore, of copyright and authorship, it is very material that your Lordship should know, not what the counsel have argued (for they in argument may have assumed that to be the fact which is not the truth), but what the plaintiff, who best understands his case, has stated in his bill, and what he has sworn to in his affidavit. My Lord, to this moment I do not understand the plaintiff to have stated by his bill, or to have sworn by his affidavit which he has made in support of it, that there is now, or ever was, a written composition. On the contrary, meaning to deal with this most respectable plaintiff as I do with every plaintiff in this Court, and knowing that he is a perfect master of language, I can only call your Lordship's attention to the most extraordinary expression which is contained in his affidavit on that subject. It may be that I may be told I am dealing here with the peculiarity of Mr. Abernethy's colloquial language, or with the peculiarity of his language when it is put into writing, but if that be so, the gentlemen will please to get rid of the peculiarity of it as well as they can. I know of no such peculiarity. I must deal with the language of Mr. Abernethy, if he condescend to become a plaintiff in this Court, and to make an affidavit in support of his bill, in the same way as I should deal with the langnage of any other person who becomes a plaintiff in this Court. Now, on the subject of the delivery of these lectures, what does he say? Does he say he delivered them in writing? No! he says he delivered them (and I take his own words) "And that the said lectures were then, and are now, delivered by the plaintiff, '*as*' from a writing."

My Lord, it struck me as a very peculiar mode of expression, and I thought I might have mis-read the copy of the bill, or, if not, I thought there might be, perhaps, not the same langnage in the affidavit as there was in the bill; I was very careful about the terms, and I was therefore desirous of looking to the affidavit to see whether the affidavit did or not contain precisely the same expression. My Lord, I have looked at the affidavit, and I find, in the affidavit which is meant to convey this fact to your Lordship, that this was not, as we state, a mere extempore lecture, but that it was a lecture delivered by Mr. Abernethy, the author, "*as*" from a written composition; and I find in the affidavit precisely the same langnage as I find in the bill. The bill states it was delivered by him as from a written paper, and the affidavit states it was delivered by him as from a written paper.

Mr. Rose. Or, in other words, the bill and affidavit agree.

Mr. Horne. My learned friend Mr. Rose says, "Or, in other words, the bill and affidavit agree." My Lord, that is my case, that the bill and affidavit agree; the bill stating the fact to be, that the lectures were delivered "*as*" from a written paper, and the affidavit stating something, (that something being quite contrary and quite unlike the fact that they were delivered from a written paper.) Whatever the meaning of that difference may be I do not know; but it is perfectly clear that the gentlemen on the other side have not been taken by surprize on that. Now, to be sure, I cannot think that my learned friend Mr. Rose, who is very guarded in his language also, would have advised the plaintiff to couch his bill in such terms, unless he knew it was consistent with the truth; for this bill is filed by a gentleman who I know will tell the truth, and who, if it had not been supported by an affidavit, would tell the truth; for I am sure this gentleman would tell the truth as much on a bill as he would if he had not made an affidavit verifying the bill; and yet neither on the bill nor the affidavit has he verified the fact, that the lectures were delivered from a written paper. I am therefore justified in drawing the conclusion, that if they had it would have been so stated in the bill and in the

affidavit, which is only an echo of the bill. Therefore, I say, unless I find the statement in the bill that they were delivered from a written paper, (and here the statement is only that they were delivered "*as*" from a written paper,) I have a right to say that this plaintiff neither states they were delivered by him, nor swears they were delivered by him from a written paper; and there is no part of this bill or affidavit which goes on to say, either at the time they were delivered or at any antecedent time, or at any subsequent time, that there ever has existed a written composition, down to the moment I am now addressing your Lordship.

Again, my Lord, the Solicitor General assumed something which was very material to his argument; he said, Mr. Abernethy is a public lecturer, and being a public lecturer, as he would have you believe, at this hospital, he thought fit to compare this public lecturer to the eminent persons in the different Universities, whose names he mentioned to your Lordship. Now, my Lord, that is another fact which I am to take gratuitously from the assertion at the bar, for I do not find any such fact either in the affidavit or in the bill. The bill does not state it. I do not find that Mr. Abernethy states he is a public lecturer, much less does he swear it; on the contrary, all I know of Mr. Abernethy (I mean here, for I am speaking of him here in the character of plaintiff; he is, undoubtedly, well known to most of us from the eminence and skill which he has obtained in his profession); but all I know of Mr. Abernethy on this record is, that Mr. Abernethy, being a surgeon of Saint Bartholomew's Hospital, and as such being, on certain days, at Saint Bartholomew's Hospital, as I conceive, to perform operations, or, at any rate, to direct the students—to teach the students—we find that, in the discharge of that duty of a surgeon in a public hospital of the country, he has performed operations—has superintended operations, and has ectured on those operations to his pupils, or to his students, (if the gentlemen on the other side like that term better,) and, as I should say, in his colloquial manner has given advice to the students; and all this taken together forms, in the aggregate, the duty which Mr. Abernethy, in his character of lecturer, or of professor in the chair—forms altogether, in the aggregate, the duty which Mr. Abernethy, as a surgeon to that hospital, is bound, in the discharge of his public duty to the hospital, to perform; and that if he cease to do it, Mr. Abernethy would cease to hold that situation; he would then, most undoubtedly, cease to hold in the hospital the situation of surgeon; for, if he cease to do these things—if he cease to lecture in the professor's chair—if he cease to say these things to those who come there to be taught, he will cease instantly to be the surgeon of that hospital. And I beg your Lordship also to bear in mind a fact, which my learned friend thinks goes for nothing, which is stated in our affidavit, and which is a fact I believe that will be found in that part of the affidavit which my learned friend stated was unimportant, namely, with respect to the advancement of surgery in general, not only does the affidavit state, as my learned friend knows, the letters patent of the late King to the College of Surgeons, but a fact which has something to do with the character of surgeons; for, with respect to the young men who are hereafter to become surgeons, not for their own individual emolument, but for the security of the practice, of which the public are not to judge, but who are to have the benefit of their practice hereafter—that the students are to be permitted to enter the public hospitals of the country, and are to be permitted to attend the eminent surgeons who practise, and dissect, and give lectures (if my learned friend like it) in the course of their operations, in these hospitals; and, if they do not attend, they have no passport to the Royal College of Surgeons, which is very essential to the security of the public—they have therefore taken care that the public shall have a skilful practitioner, for they will allow no one to practise without a certificate from the hospital that they have attended those lectures before they can become surgeons. Then, my Lord, I ask, is this to be assimulated to the case of a sermon, or any publication which a man may withhold, or may not

withhold, and where it is quite optional with him whether he will publish it or not, or, having composed the work, it is quite optional what he will do with it? In my humble opinion, no two cases can be more unlike than those two cases; but still it is not incumbent on my client to prove what it is unlike; it is sufficient for him to say it is not the same. And unless my learned friend can state accurately on his bill, and more accurately on his affidavit than this plaintiff has done, what the plaintiff's case is with respect to which he seeks to restrain the publication of this work by injunction, I submit to your Lordship it is not incumbent on the defendant to prove what the plaintiff's case is; it is not for him to do that; it is for the plaintiff to prove what his case is, and when he has proved what his case is, then we know how to deal with it in point of fact and also in point of law; but at present we neither know how to deal with the plaintiff's case in point of fact nor how to deal with it in point of law. But this we know, after the able argument and after the logical argument which we have had from both my learned friends—this we know, that your Lordship's observations have wrung from them a tacit admission, that no such case as the present has ever been decided. And if that be so, then I ask the gentlemen whether this is a case for an Injunction? I do not mean to say, that because a case has not ever been decided, that therefore it may not be a fit case for an injunction; but still I submit to your Lordship, it must be a case which is clear in point of fact on which the law must turn; and when it is clearly stated in fact, the principle of law must be so clear as that not only on a direct decision, but on an analogy to other decisions, this Court has no doubt on the subject.

My Lord, I say this case wants both those ingredients; it wants the necessary statement of fact, and, without that statement of fact, we cannot know here how to meet the case; and the gentlemen on the other side are not to impute to us that we not understand the case if they do not understand it themselves; the plaintiff is to understand his case, and to make it intelligible before he can call on us to give an answer to it. Now, we say, he has done neither the one nor the other, and therefore I am at a loss to know on what ground the plaintiff is entitled to an injunction. It is perfectly clear to me that the attention of my learned friends never could have escaped (knowing the penetration which they possess) any decision, if there had been any decision on this subject; but it was their intention to have all the material parts of the case taken for granted, and, after exercising all their great ability on the subject, they would have your Lordship come to the conclusion which they aimed at. My learned friend Mr. Rose fancied, though I think his imagination was rather too fanciful on the subject—he fancied he could satisfy your Lordship that this ought to be done, because it had been done before, and he quoted the well known case, I think, of Love for Love, the case of my Lord Chesterfield's Letters, and he might have added a prior case, decided by my Lord Hardwicke, which is in the second volume of Atkyns. But in no one of these cases was there the necessary ingredient wanted of a written composition; in all those cases there was a written composition, and the Court there was not called upon to deal with it as it is with the question which my learned friend has raised in this case, namely, Whether a professor in the chair, in a colloquial, or in any other manner, has delivered his sentiments to those to whom it was his duty to deliver them? But in all those cases the argument was bottomed on this fact, which was indisputable between the parties, namely, That there was a composition—a written composition—and which composition could not be denied, either under the statute of Anne, or under the preceding common-law right; and when that was discussed in the great case of Taylor and Millar, it was not disputed that there was, in point of fact, a written composition, and a title either to the copyright under the statute of Anne, or a common-law right of the author in it. What was the case of Mr. Pope's Letters? They were not Mr. Pope's conversations which were carried—which Boswell carried into Doctor

Johnson's Life,—but they were the letters of Mr. Pope and others. In Lord Chesterfield's case, they were the Letters of Lord Chesterfield, with some strong circumstances accompanying them; and it was said in that case, as it is in a great many others, That they were published from something like a breach of faith between the mother of that individual and the son of Lord Chesterfield, by whom they were written; because it was a correspondence which took place after his death, and which it was extremely improper should be published, and particularly improper that it should be published after the originals had been given up. And then there was the case of Macklin and Richardson; but do the gentlemen mean seriously to assimilate this case to that? The case of Mr. Macklin was a case of the publication of a play; and the question was, who was the author that composed the play? The question was simply about the composition of the publication, and the whole argument turned on that. It has been said, that, if a man write a play, and give it to an actor to act, he therefore gives him the copyright in the play. But how was the fact in that case? That it was a written manuscript that was taken to the play-house, and the actors learned their different parts; it was taken there, by Mr. Macklin, for that purpose; and he let it out on more than one occasion for 20*l.* to certain persons to perform a given number of nights, but still he always retained the manuscript; they were his own notes, and there was a person who went to the play-house, a short-hand writer, as it was held by one of the judges, who took down from the months of the actors the play as it was acted, and the question was, whether that gave him a right to publication? And, to be sure, if that publication had been allowed, it would at once have deprived the author of the drama of the benefit of the manuscript notes, and the writers of dramas would then become the most unprotected people in the world; for no one hears a drama until it is acted, and if acting a drama is to deprive him of a copyright, the authors of dramas are certainly the most unhappy of all authors. The public would not be likely, I think, if that were allowed, to find any man eminent for his wit and humour who would devote himself to the writing of dramas—I think not; but those were the facts of that case. Then how do those cases bear on this? And there have been no other cases quoted by my learned friends. Then, I say, in point of fact, that that case, at least, is utterly unlike the present, and has no analogy to it. With respect to the doctrine, as applied to that case, neither my learned friend nor myself have attempted to deny that doctrine; for it is perfectly plain and just, as applicable to that case, and that it is just there can be no doubt, because, in that case, there was indisputably a work of which there was an author. I say here, my Lord, there is no author, because there is no work; and, being no work, it follows, as a necessary consequence, that there is no copyright to which the plaintiff can say he has a right. That, my Lord, really is the short case between the plaintiff and the defendant.

Well then, my Lord, my learned friends have supposed that it is quite immaterial, in point of general reasoning, whether there be a written composition or not. Now I cannot follow my learned friends in their general reasoning, or at all in the loose notion which they entertain of this subject; I must circumscribe my argument to the law, and I know nothing of the law except as I find it in our case. I say that no case has been found in which this question has ever been decided, that none such can be found; and that to establish the rule now, for the first time, would be found to be a very inconvenient doctrine. I think the convenience of granting the injunction would, in this case, or in a case like it, be infinitely overbalanced by the great mischief which would arise from keeping works of this nature secret. My Lord, Mr. Abernethy, according to this doctrine then would have a *right never to publish* as the author, and he would have a *right also never to compose*, and yet he would have a *right to call himself the author*, because he chose, in a certain place, in the discharge of a public duty, to talk on certain subjects which are of the utmost importance to the

public, and of essential importance to the audience who attended, or, at least, to a great portion of them, and without which they cannot, according to the admitted rules of the institution, practise as surgeons. It is of particular importance to the public that knowledge of this sort should be spread among them, that they who afterwards may become their patients may know that they are attended by surgeons of competent skill; it is likewise of great importance that knowledge on this and all other subjects should not be misrepresented; and it is also of great importance to the plaintiff, Mr. Abernethy, if he have that peculiarity of manner which appears to belong to him, that it should be held out to the public. But that is not the question here. It is of great importance too to Mr. Abernethy, and he has a right to expect it from any individual or public work, that the work which purports to publish the Lectures delivered by him should not be misrepresented, and that the merit which he has so justly acquired in his profession should not be tarnished. And I apprehend, if Mr. Abernethy chose to publish a composition of his own on a subject in which he is so eminently skilled, (and perhaps he is more competent to be the author than any body else,) he has exactly the same right as any other author has; but, unless he really be the author, it is idle for him to come here, he not being the author, to discuss the subject. For no man can come here to discuss that question, and to ask for an injunction, unless he prove the existence of the work, and that he is the author of it. Now, I say, Mr. Abernethy has failed here in proving the existence of the work, and consequently that he is the author of it; and, unless the gentlemen on the other side can contend that there is such a work in existence, they have no right to come to the Court to ask for an injunction. When a man comes into a court of justice and complains of a piracy of his work, my learned friend knows that the piracy of the work is a question that can be tried, and is capable of being tried, and he knows that he cannot be heard in this Court *except he be able to produce his work*, in order that it may be *compared* with that which is said to be the *piratical work*. For, if it were otherwise, where is the test by which your Lordship can try that question? How can your Lordship try whether that which is said to be the piratical work be true or untrue.

One word more, my Lord, on that subject; and if Mr. Abernethy were here I am sure he would forgive, because neither he nor any man will suppose I am thinking he is capable, for I am sure he does not mean, to misrepresent the facts; but what I say is, that it is most idle for Mr. Abernethy, or any other man, to suppose that he can have justice meted out in this Court which every one of the King's subjects may not. And your Lordship, I am sure, is aware of the inconvenience which would be the consequence of the equity which is contended for by the other side, if it were to be meted out to Mr. Abernethy singly, as an exception to the general rule, differently to what it is to the rest of the King's subjects; but it must be meted out in the same way to him as it is to all the King's subjects. The inconvenience would be monstrous, and the perjury would be monstrous: it would be impossible to try the fact, and it would be impossible for your Lordship ever to get at it; and yet your Lordship is asked to take all these things for granted to be untrue—every thing against the publishers, but upon what ground I do not know. Why the publishers are to have every thing inferred against them, and on facts too which create no just inference, I do not know. Why the supposed author of a work is to have every thing inferred in favour of him who makes the application to the Court that it is his work, and that he is the author of it, and not we, especially when he will not condescend to produce his work, I do not know? But if your Lordship should decide that the Injunction ought not to be granted, it will necessarily teach the public that injunctions, which are special remedies to be obtained only in this Court when the case is so clear in point of fact, and in point of law, that no lawyer can doubt it; it will be teaching the public that persons are not to come into a Court of Equity, on a specula-

tive case, and state their case as they please; that they are not to state it one way one day, and, if they do not like it when they have stated it so loosely, state it another way to-morrow, and go on varying their case as often as they please, and all that time the defendant is to be tied down by the Injunction of the Court, not because he did not understand his own defence, but because he did not understand the plaintiff's case; and understand it he cannot, and therefore it is impossible he can make a defence either at law or in equity to it.

My Lord, what we say is, that he who comes into a court of justice and complains is bound to state his case on the record clearly, and not by argument or by word of mouth of his counsel, and that even if it could be understood by my clients here, which I submit it cannot, I say it is not, and never ought to be an argument in the plaintiff's mouth against the defendant, that he does not understand the case of the plaintiff. It is the business of the plaintiff to make out his case, and I apprehend, therefore, the gentlemen have not, by any means, established even a foundation for the argument, that there is a copyright here in Mr. Abernethy, or that he has, either at law or in equity, any right for which his counsel can contend. I will assume that my learned friends the Solicitor General and Mr. Rose are capable of presenting more powerful arguments, and arguments which are more worthy the attention of your Lordship than those which have suggested themselves to the minds of Mr. Shadwell and myself, but is that a ground for an injunction in a new case, where, after the experience of the last fifty years which has suggested itself to the mind of any man who has attended in a court of justice, and which I say is a strong argument against such a case as this—where the provocation has every day existed, as it has in this case, and where it is quite clear it exists at this moment, not only with respect to Mr. Abernethy, but with respect to a great many other "Professors in the Chair," as they are called by my learned friend, at the place where these lectures are delivered, and in the neighbourhood—where similar provocations have existed—where they now exist, and have existed for the last fifty years; because lectures of this sort most indisputably have been published without the slightest degree of fault being found. I therefore humbly ask your Lordship whether the omission and neglect of the plaintiff, under such circumstances, in coming into a court of equity for this extraordinary equitable relief, is not a circumstance to be taken in favour of the defendant, and not against the defendant and in favour of the plaintiff?

Now, my Lord, with respect to Mr. Abernethy, has he come here in time? This bill was not filed till December! When was the first publication, not of The Lancet, but the first publication of Mr. Abernethy's supposed works in The Lancet? Why early in October. Mr. Abernethy, it is true, may have been much better employed than reading The Lancet; but yet he is not now able to tell your Lordship, either by his bill or by his affidavit, though his lectures in The Lancet began to be published early in October, that he never heard of it till now. That might be an answer to the ground which we make on the part of the publishers of The Lancet, that he ought to have come into this Court before. But he gives your Lordship a history of all the proceedings which have taken place from the commencement of the publication of The Lancet down to the present time. Nay! he tells your Lordship now soon he began to complain! But where did he complain? Why in the professor's chair, as my friend the Solicitor General calls it! And he states that the next number contained the complaint, which complaint is stated as a part of the publication, and that complaint was made in the lecturer's chair (to use the language of Mr. Abernethy), and I do not complain of his using that language, though I think the gentlemen on the other side will hardly be grave in contending that that was part of the professor's lecture delivered from his written composition in the professor's chair! Then what was it? It was part of the colloquial recitation with which Mr. Abernethy, in the character of surgeon to this hospital, in the general discharge of his duty as surgeon to this hospital, thought

right to entertain those about him, not as students or as professors of an abstract science, but as young practical surgeons of this metropolis, who may hereafter have to visit the hospital and their patients on this most important subject of medicine, and with a view to perform operations and to practise as surgeons; and nobody knows better than Mr. Abernethy does (for he holds a very high office in the College of Surgeons), that among the bye laws for the regulation of the College of Surgeons, young men meaning to practise as surgeons must first become members of the College of Surgeons, and that they cannot practise unless they do attend the hospital, and have a certificate from the surgeon that they have attended there. So that here is Mr. Abernethy, in the character of one of the leading members of the College of Surgeons, laying down rules by which all are bound. And where he goes, as we say, in his character of surgeon to the hospital—but I presume the gentlemen on the other side will say as a sort of public professor—to an institution of the country where, whatever practice or whatever theory may be delivered from the mouth of that learned person, whose duty it is to deliver the lectures, it is admitted the practice is not to be kept secret; for the students cannot practise unless they attend the lectures. I do not mean to say the Court is not to look to what Mr. Abernethy's situation is, or that there is not to be an Injunction against The Lancet, or any other publication, if it state of Mr. Abernethy that which is not true of him, or if it state of any surgeon, in any hospital in this country, that which is not true. But suppose a person states the practice of any surgeon in any public hospital, and exposes to the public that which is true, yet is not credible because it is spoken of him, is that evil or good? With great submission to your Lordship, I should conceive that to be the greatest good. It is a check on the hospital practice, and unless there be a check existing, I know it in Mr. Abernethy's case, and it is so probably in all cases of surgeons—in other days the thing may not occur, but I am speaking of the general principle, and as this is a public hospital, or a public institution, in which the public have an interest, I submit it is a subject with respect to which the public have a right to information.

And then comes a most important question indeed: if the gentlemen cannot separate Mr. Abernethy the surgeon from Mr. Abernethy the professor, they cannot in that view deny that we may publish, provided it be done truly, all that Mr. Abernethy did in the way of operation in the hospital. What! are we then to be confined to the publication of a mere dry detail of surgical operations? Suppose an operation be attended with an observation by the operator to his students, is not that to be published? Where is the line to be drawn? Our argument is, that the professor in the chair—that Mr. Abernethy the professor, as he is called, is no distinct professor from Mr. Abernethy the surgeon. We say, Mr. Abernethy the surgeon consents to accept the office of surgeon in this hospital, for the purpose of doing good; that he may give to the public a knowledge of his skill in operating, and of his knowledge in dissecting and lecturing; and we say the public have an interest in that; and, having an interest in that, they have a right to have published every thing which passes there, not merely the manual operations of Mr. Abernethy, but also his colloquial dissertation on those operations; and I ask the gentlemen, therefore, unless they can make a distinction between Mr. Abernethy in his character of surgeon, when he is operating and attending operations, and Mr. Abernethy the professor in the chair, what right have they to make a distinction between the publication of what he does in his character of surgeon and what he does in his character of professor? I must utterly deny that which the gentlemen on the other side contend for, and which, I submit, is a most material fact in this case, namely, that Mr. Abernethy is a distinct professor of science, as they will have it. And then, to refer to the cases which my learned friend has cited to your Lordship, and to make a comparison of cases where no analogy exists, there is a further difficulty in the case: if my learned friend can go so far, which he can only do

by his own powerful reasoning, there is a further difficulty, which I do not believe he will find in the cases that have been decided. So that if I admit to my learned friend that Mr. Abernethy the surgeon is a distinct person from Mr. Abernethy in the chair, in the delivery of these lectures and dissertations, (and I do not say he may not advance the argument, or that he has not a right to advance the argument,) still he has not made out his proposition, which was this: that the law then would be clear, and, as he said, not only clear, but so clear that it would be a matter not only of trial but of judgment. Is it contended, that this matter cannot be tried? and if it cannot be tried, why not Why! because Mr. Abernethy can no more offer to a Judge or jury on the common-law side of Westminster Hall than he can to your Lordship the test by which it can be tried; and if he were to go into the Court of King's Bench, and there, through my learned friend the Solicitor General, have his case opened as it has been opened by him to-day, I ask my learned friend, with all his experience and talent, which I know is infinitely beyond mine, how he would attempt to support the case? By what test? How he could prove the fact? How he could prove the violating of the work? The very foundation of the question failing, there not being produced or producible the original of which he says this publication is a piracy, and it is *impossible to produce it; for there is no such work in existence.* Therefore, if he were to bring such a case into Westminster Hall, although I know his argument and his eloquence would adorn the case, yet still he must fail, and would not be able to get a verdict. Then, my Lord, I say, as this is a case which never has been tried, (and if it be a case in which there is the least probability of getting a verdict, why does not Mr. Abernethy go to law?) is there any ground which can be stated to your Lordship in this case to be an irremediable mischief to Mr. Abernethy resulting from this publication? What is an irremediable mischief? An irremediable mischief it undoubtedly would be if we were accused of having published any thing libellous of Mr. Abernethy, such as misrepresenting him in our publication. But, on the contrary, Mr. Abernethy is perfectly content with it—nay, he is so content, that the only fault he finds with us is the very *minute and accurate fidelity with which we convey his sentiments to the public.* What then is the irremediable mischief to Mr. Abernethy? Is Mr. Abernethy an author with an existing manuscript, which he has offered for publication, which he either has printed or intends to print? No such thing. What then is the irremediable mischief peculiar to his fame? None! What to the cause of science? None! Unless the enlightened opinion of such a man as Mr. Abernethy should be kept from the public. The irremediable mischief, therefore, resolves itself into this: that Mr. Abernethy has made statements to persons whose memory is so good as to enable them to publish them to the world so accurately as that he makes no complaint on the ground of inaccuracy, and which Mr. Abernethy, even if he have the manuscripts, probably never will publish, however highly valuable they may be to the public at large. Either he may be too lazy (if I may so express myself), or he may have his attention so much occupied in other ways that he may never put them into publication, that they may go forth to the world. Then is the publication of them in The Lancet, and which is admitted by all to be a very minute publication of them, an irremediable mischief? And are the public to be deprived of the benefit to be derived from the enlightened labours of Mr. Abernethy, which but for the publication in this Lancet, or some other publication, might never appear before the public?

With respect to Mr. Abernethy, therefore, the irremediable mischief resolves itself into this, that it is an irremediable mischief arising only from pecuniary profit; and who ever heard of such a thing as one man complaining of another for having published that which, I apprehend, he has a right to publish, when the person complaining has not published, and does not pretend to say he ever intends to publish, it himself? For there has been no attempt made by Mr. Abernethy, and none made for him, either to produce the publication or to

say there is such a publication in existence; he does not say, "I have my publication at my bookseller's shop, printed on fine handsome paper, which I am selling at five shillings a volume, or whatever it may be, and you are underselling me with your sixpenny numbers." No such thing!—The evidence is all on one side with respect to the publication. We are publishing what is true, and the complaint is that it is true. Then, if that be the only irremediable mischief resulting from this publication, and there is nothing but this, it is that the public are to be glutted with the science and eminent labours of this eminent individual who is now the plaintiff at your Lordship's bar. But when he comes to publish it in another form, not for his own pecuniary profit, for he wants it not, and I am sure he would be above that, but probably for his posthumous reputation, then, perhaps, the question may arise, whether, with respect to his own family, if after his decease any one may think proper to publish it—then, perhaps, it may be said to the publisher of The Lancet, "You shall not publish this work, for we intend to publish it ourselves."

My Lord, that is the only irremediable mischief into which this case resolves itself; and I submit to your Lordship, on the facts of the case, as they now appear before you, it is a question clearly to be tried at law; but which never can be tried on the legal question—on the simple legal question—because the plaintiff is not in a condition to try it, and, as we say, he never can be in a condition, from his own neglect, to try it; and therefore it is impossible that Mr. Abernethy can have his injunction on any irremediable mischief. I am aware, my Lord, that a future irremediable mischief gives a sort of peculiarity to the case, and that there is less equity in the case on that account than there might otherwise be; and that being the only irremediable mischief—that, as I stated before, must go for nothing—for it is neither more nor less than a future loss which may never arise, or rather a depreciation which may never arise, to the work; for it is only this—that some part of this gentleman's family may, after his death, say (although there may be no prospect of that), "our work would have sold to so much more advantage if the public had not been previously enlightened by the publication of The Lancet."

My Lord, with respect to the public, it is a great advantage to all mankind to have such eminent labours as those of Mr. Abernethy published, and particularly with respect to the advantage to be derived from them by a large portion of the public, who have a more direct interest in them than the public at large; I mean all those numerous candidates, not for professional honours in surgery, but those numerous candidates who, from their professional reputation, are to obtain from them their bread, and those candidates also for professional skill, without which, perhaps, they may not be able to get their bread. I do submit to your Lordship, in a case where there is no reason to doubt the benefits to arise from the dissemination of such a work, and more especially as this work is admitted to be a most faithful transcript—not a transcript, but a most faithful statement, of every thing that has fallen from Mr. Abernethy on this most important practical subject—that there is an incalculable benefit to be derived from it by the persons practising in that profession, and, if it be so, I might almost say still greater benefit to be derived from it by the public; and nothing can be of greater benefit than these works to practitioners in the future practice of surgery; for it will enable them to practise with greater skill on the public at large, or on those persons who may have the misfortune to become the subjects of their operations. If, my Lord, we are at liberty to go into the immediate consequence itself to the public, and as to whether it be a benefit or not, I apprehend there is no man who, if he confine his attention to it for a moment, will not say that the discontinuance of such a publication will be a great prejudice to all the rising generation of surgeons, and that the continuance of it will manifestly be a benefit to the public, on all the general principles which I have stated. And with respect to Mr. Abernethy himself, as to the question of profit, to which at last this case resolves itself, I say that is a question which is beneath his consideration. If

it were the question of profit alone, I am sure Mr. Abernethy would throw his case ont of Court, and tell your Lordship he does not want to sustain it on that ground; the object, therefore, on which he wishes to sustain his case must be the other grounds, though fanciful and unfounded I submit they are, which have been stated by his learned counsel at the bar.

For these reasons, I submit to your Lordship, either in this state of the case or in any other state of the case, and of the facts of the case, that this injunction ought not to be granted.

Mr. Shadwell. My Lord, I am on the same side with my friend Mr. Horne in this case, and, my Lord, when this matter was first mentioned to your Lordship, a few days ago, it appeared to me clearly, from the statement which was then made by your Lordship, namely, "that it would be very short," your Lordship apprehended that the case was a case of piracy, by the defendant, of the written publication of the plaintiff. It is quite clear, I think, that that was the apprehension entertained by your Lordship, from the mode in which your Lordship delivered that opinion, which, I am free to say, any Judge in Westminster-hall would have delivered on an apprehension that such was the case; and undoubtedly, if that were the case, it would have occupied but a very short time. My Lord, when the affidavits had been made on both sides, an opportunity was given to us to see the mode in which the plaintiff had stated his right; and, I confess, I was very much struck by the cautious and measured language which was used, not only in the bill, but in the affidavit, as to the mode in which the lectures were stated to have been delivered. In one part of the bill the plaintiff expresses himself thus: that the lectures were and are delivered by him "*as*" from a writing, the property of the plaintiff, composed by the plaintiff; and which the plaintiff has not as yet printed and published; and that the lectures are the sentiments and language of the plaintiff." And then, in another part of the bill, towards the close of it, where he has occasion to allude to the subject again, he charges that "he alone has the property of the said lectures, and of the sentiments and language thereof; and that the copy or writings from which the same have been, and are in future to be, delivered, are and is the property of the plaintiff."

Now, my Lord, that is the language of the bill; and, after the observations which have been made on the sustained language of Mr. Abernethy, it certainly appears to me that Mr. Abernethy is entitled to the praise of that at least; because, when he has seen the language, he permits it to stand in that cautious and measured language rather than use his own. And in his affidavit he follows that language most implicitly. When he comes to tell your Lordship his own statement, which ought to be the effusion of his own mind, so far from following language of his own, he implicitly follows the sustained language of my friend Mr. Rose, who carries it to this extent; for he does not only use the expressions which are stated in the bill, but he goes on, after stating that the copy or writings from which the same have been, and are in future to be, delivered, is and are the property of the deponent, and that the "deponent well hoped that the said G. L. Hutchinson, John Knight and Henry Lacey, would have desisted from their publication thereof."

So that your Lordship sees that Mr. Abernethy has intrusted his case to a gentleman who, from his skill in making the most of a case, has not permitted it to be fully and clearly stated; but inasmuch as this ambiguous language was introduced by my friend Mr. Rose, Mr. Abernethy has adopted it implicitly in his affidavit.

Now, my Lord, if there had been a previous composition, in writing, of the lectures delivered by Mr. Abernethy, how easy and simple a thing it would be for Mr. Abernethy to have declared, that he did deliver these lectures from a composition in writing, but that he chose to give it in the form of an extempore delivery, the thing itself being merely an oral dissertation of what had been previously committed to writing. Now, when the case might be so simply stated, and instead of that simple statement your Lordship finds these well-chosen ambiguous words; the fair inference

is, that there has not been, and is not now, any written composition of which this printed publication is said to be a counterpart, or a copy. And, indeed, Mr. Abernethy himself does not seem to know, according to the language he has used, whether there is one writing containing the lectures delivered by him, or whether there are many writings; for, according to his language, it is doubtful whether your Lordship can characterise that which alone can be considered the copyright as a writing or writings.

Now, my Lord, there have been a great number of cases, within the last hundred years, on the question of copyright; but I do not believe there has been a single one in which it has been held, either in a court of law or in a court of equity, that a person has a *right* to a *mere oral speech* delivered by himself, not being the impression taken from a written copy.

My Lord, one would have thought that the publication of such a work as Boswell's life of Johnson would have raised the question, if any such question could be raised; because, although that work gave information to thousands, your Lordship knows it gave pain to many. And if there could have been an opportunity of preventing the publication of the work, so far as it represented the conversations of persons who felt pain in seeing their conversations represented, it is but reasonable to suppose that some application would have been made to prevent the publication of them. I apprehend, therefore, my Lord, that the absence of any application of that sort is, of itself, a sort of precedent that the law does not recognize a right of property in a mere oral speech which has not been previously embodied into writing.

My Lord, certainly it was a matter of contest, in the case of Millar and Taylor, whether, independent of the statute of Anne, there was a common-law right given to the author in his written work. But, my Lord, the statute of Queen Anne only meant to give to the author, by the means which are there pointed out, a more beneficial enjoyment of the common-law right, if he had it, than he had before. The statute of Queen Anne only meant to give a better protection to the same right. And what is the language of the statute of Queen Anne? It commences, my Lord, by stating, "that printers and booksellers, and other persons, have of late taken the liberty of printing and publishing, or causing to be printed and published, *books* and *other writings*." And the only subject of legislative interference, by the statute of Anne, in which I admit, for the sake of argument, there might be an antecedent common-law right, is something which exists in the shape of writing or print. The same language, your Lordship knows, is also used in the statute of the 54th of the late king; which, in some degree, amplified and varied the copyright of the author; but which expressly applies to *written* compositions, for there is an express distinction taken, in the section to which I am alluding, between a book *composed and not* printed and a book composed *and printed*.

Now, my Lord, the statute might, if it had seen right—the legislature might, if it had judged it right—protect a work which had been in existence only in the *mouth* of the speaker; but your Lordship will find, in both the statutes, care is studiously taken that protection should only be given to that which is capable of conferring the copyright on the author, by reason of its absolute existence, embodied in the form of *writing* or *print*. And, besides that it has been extended to that which may be properly called a *book*, the copyright has been extended to a musical composition; for, my Lord, there is the report of a case—the case of White and Gerrick, in the second Barnewall and Alderson, 298—where the subject in discussion was a favourite dance called "Captain White," (and most military men are naturally disposed to dance more or less in the course of their lives.) Captain White, my Lord, composed the dance; and it appears the dance had never been printed, nor published as a printed work, but had been written in manuscript, and communicated, by the author, to his friends; and then this manuscript, which had been so communicated to his friends, was pirated by a printed copy. There, my Lord, there certainly was some foundation for saying there was a copy-

right, which should be protected, within the meaning of the statute; because it was a work which *had been* written. But suppose the case had been otherwise—suppose Captain White had walked down some public street, whistling this tune, could it be said that an action could be maintained against a person who caught the tune, and then, for the first time, embodied it in notes, and sold it as a favourite tune? No such instance has been produced; and therefore, I apprehend, your Lordship will now, in your duty of following up the law, take care that you do not exceed what is the law. No case has been stated by my learned friend the Solicitor-General. He has indulged himself in a vast number of observations on the nothingness of our affidavit; and I might have said his observations were full of vacuity as to the law of the case; because, although he assumed throughout that there is a law which will protect a copyright in a work that *is* either *written* or *printed*, yet he used no argument to show that the law extended to the copyright in a thing that was *merely oral*.

Now, I apprehend, your Lordship will not, for the first time, exceed the law. My Lord, there is also a reason why your Lordship should not exceed the law; for, I apprehend, it is the practice of a Court of Equity to take care of what are called the rules of a Court of Equity. Now, my Lord, the subject of complaint is a Lecture that was delivered on the 4th of October, and which was printed on the 9th; and from week to week has the publisher of The Lancet gone on publishing the Lectures, as they were periodically delivered. Now, my Lord, if Mr. Abernethy has a right to complain, and a right to apply to this Court for an injunction, he ought to have applied sooner; instead of which, as your Lordship knows, he waits until the ninth number is ready for publication; and that then, at that time, for the first, he introduces his case before the Court. I say, therefore, my Lord, without entering into this more knotty question, as my learned friend the Solicitor-General, in his reply, will endeavour to make it; though, to my learned friend and myself, it is so exceedingly plain, for want of authority, that there can be no difficulty in it—that, independently of any question that Mr. Abernethy has raised on the pleadings, we say, Mr. Abernethy has come too late to entitle himself to the protection of this Court.

My Lord, there is another observation to be made in the case. Mr. Abernethy himself represents that this is a verbatim copy; and it appears, by the confession of the writer of The Lancet—that is, in the printed work,—that it is done with the most minute fidelity. My Lord, supposing it had not been a faithful copy, then the case would have assumed a very different shape. If any thing had been represented which was injurious to Mr. Abernethy, then the question might have arisen, whether he might have come into this Court and stopped the publication of the libel? But according to the doctrine of the Court, as it now stands, he has no right to prevent the publication of this work, because he has no ownership in it—no property in it.

My Lord, the case is now stated on both sides, and it appears now quite clear, that the character of the delivery of these lectures is, that they were orally delivered; and certainly it is not an unimportant part of the case, that the effect of publishing this work is not to deprive Mr. Abernethy of any pupils who attend him; in that point of view he cannot complain, because your Lordship sees, that the rules of the hospital—that the rules of the college of surgeons—have made the attendance of the pupils on lectures necessary. Now there is nothing in those rules which have imposed on the pupils that they are *not* to disseminate to the world the information which they receive from the lectures; and if, in compliance with the rules of the institution of which Mr. Abernethy is a member, he thinks proper—

Lord Chancellor. There is no evidence before me that they are publishers of this publication; there is no evidence before me that can fix the publication of this work on a pupil.

Mr. Shadwell. No, my Lord, it never has been said to be so; persons may go who are not pupils—there may be many persons who, having no other means of passing away their time, for their own instruction, and as mere

cultivators of general knowledge, may wish to go there. I was about to observe, my Lord, that there is nothing in the terms of the rules of this institution, which has restrained the pupils from publishing the information which they derive from the lectures, and there is nothing which restrains the parties from taking down what they hear. Suppose some person had attended who was possessed of a very strong memory, might not that person as well repeat to others that which he had heard, in the same manner as Mr. Abernethy would have it inferred, though he does not like to make the statement, that from his memory he delivered that which he had previously written. I apprehend, my Lord, there is nothing in the terms of the rules of this institution which can prevent any person who has come into the lecture-room, and attended the delivery of a lecture, which has restrained him from making what use he pleases of it, provided he makes a fair use of it, and one that is not disadvantageous to the public.

My Lord, this case has been assimilated, by my learned friend the Solicitor General, to the case of Doctor Paley's Sermons, which was the case of sermons delivered at the Universities; but, I apprehend, my Lord, this case fails totally in every point of resemblance with the things to which it is compared, because the things to which it is compared are written publications. Now, my Lord, I ask, whether in this state of the case your Lordship thinks it is a convenient thing that you should interfere now? My Lord, when no case has been produced, the least that can be said is, that the law ought to be established before a party has an equitable relief, by means of an injunction in a summary manner. And your Lordship has taken that view of the case, in a case where it appeared to be a question, whether there could be a copyright or not—in a case that was argued some two or three years ago, in the case of Doctor Robinson's Lectures; and when, on another ground, there was a doubt, there your Lordship directed that there should be an action brought, and that it should be made out. Though the Court granted an exparte injunction, in the first instance, your Lordship directed that an action should be brought before you would sustain the injunction which had been granted exparte. Here no injunction has been granted exparte; but the law remaining, to say the least of it, in a state of very great doubt, your Lordship is asked now to interfere to grant an injunction.

My Lord, I apprehend your Lordship will not now depart from the course which you have hitherto adopted. There is one other observation to be made on the nature of Mr. Abernethy's lectures, which arises from the lectures themselves, which is this: he seems to represent, in his opening lecture and some other lectures, that there had been, for some time, laid before the medical world lectures delivered by Mr. JOHN HUNTER, and your Lordship will find (if you will be pleased to take the trouble) that whole sentences, which your Lordship is now required to believe, by Mr. Abernethy's affidavit, have been written by him, and are in some copy which is capable of being published by him—that whole sentences are taken from Mr. John Hunter's works. Mr. John Hunter has printed a work which is in the possession of many persons, and your Lordship will find, in the course of this work, that the scientific system which is laid down by Mr. Hunter is followed by Mr. Abernethy. The very terms which Mr. Hunter has used are adopted by Mr. Abernethy; and therefore one cannot but suppose, notwithstanding the doubtful language which is used in the Bill, that Mr. Abernethy has either made an extract from Mr. John Hunter's work, or has gone over Mr. John Hunter's work in such a way as to impress on his mind sentences which are in Mr John Hunter's work, and in that state has gone into the room to lecture. And it will be found to be the case, by a very short and cursory view, that so many passages are taken from the work of Mr. Hunter, that it cannot be supposed Mr. Abernethy, in his lectures delivered in this hospital, has been doing the world a service by his own observations, but by a sort of critique on Mr. John Hunter's work, which work becomes very much a lecture for the students now.

My Lord, I should state in justice to the defendants, for whom I appear, that they have, throughout their work, or at least in a great number of cases, when they have had occasion to mention lectures delivered by other medical men, in Great Windmill-street and other places, they have drawn the attention of the readers to the circumstance whether the lecture was delivered *viva voce*, or from a written paper. I find it stated, in page 20 of the first number, in this form, "precisely at seven o'clock Mr. Brodie entered this theatre, and immediately proceeded to *read* from a paper the following address." I find also, in page 27, at a lecture delivered in some other place, "at eight o'clock Mr. Green entered the theatre, and proceeded to *read* from a paper the following address." And it is so put in a variety of the numbers. If Mr. Brodie and Mr. Green meant their lectures should not be copied, they have taken the right course, because the lectures they delivered were from a written paper; not that this gentleman, who, on some occasions, pursued the same course, has made the least imputation on the publisher of The Lancet for having mis-stated the contents of that which was delivered from a written paper.

My Lord, Mr. Abernethy seems to suppose, as I collect from him, that this was a more convenient mode of delivering his lectures; but still, in what are called his sustained compositions, he has met with no injury; because, my Lord, the author of The Lancet expressly makes an apology, and states that he does not mean to criticise this in the same manner as works of a more deliberate cast would justify, but he draws a distinction between what is called the sustained composition—that is, the written delivered composition—and that which is orally delivered. And, therefore, I apprehend, the very nature of the complaint which Mr. Abernethy makes is grounded on this: that there has been a publication in print of that which is *not*, in point of fact, a *sustained composition*, by reason that it had not been all previously written; and that is a ground to show that the case is, as my client supposes it to be, a case in which there was an extempore delivery of that which was not written; and consequently my client is entitled to say that the law of the land does not authorize your Lordship to grant this Injunction.

The *Solicitor General* then addressed the Court in reply as follows:—

My Lord, in this case it is my duty to address your Lordship in reply, and it cannot be disputed that the question in this case involves a question undoubtedly of considerable magnitude.

My Lord, as I understood the arguments of my learned friends on the opposite side, they narrow the matter in question considerably, because they concede to me, that if any individual, whether he be what is termed a public lecturer, or an individual reading Lectures to a certain class—giving Lectures to a private class—if he reads his Lectures to a private class, that he has a title and a matter of property in those Lectures because the Lectures are read. But they say, if the same lecturer happens to deliver his Lectures orally, that he has no property—no right or title in those orally delivered Lectures, which a Court of Equity will protect. So that really, my Lord, we are arguing on this mere simple circumstance; although there is, undoubtedly, a distinction between the argument of my learned friend, Mr. Horne, and the argument of my friend, Mr. Shadwell. I shall, however, take the line of argument of my friend Mr. Horne; and without meaning to make any invidious distinction, I should say, my friend, Mr. Horne, approached closer to the question than my friend Mr. Shadwell has done; but, taking either of their arguments, the fact seems to be admitted, that in a Lecture delivered from a written copy—a Lecture so delivered, the lecturer has a property, or a title, which a Court of Equity will protect. And it will be my duty by and by, (perhaps presently), to consider this case not entirely on the strict nature of the property, but whether the nature of the property be such as that the same gentleman, in an orally delivered Lecture, has no right, or title, or property whatsoever, because it was orally delivered. So that the proposition stands practically thus: if a surgeon, or an anatomist, or any other gentleman, convenes together a large class of people, and I will take my learned friend Mr. Horne's distinction, though I will not denominate Mr. Abernethy as a lecturer in the sense in which he understands him; but yet I will take it first as to the property which

such a Lecturer has, and then I will take it as applied to a public lecturer appointed under the letters patent of the Crown, or as a professor in the chair, and, by and by, I will take the question with that peculiarity about it. At present I am discussing the question as it relates to an individual exercising the duty of a private lecturer—that is, a surgeon who may convene together, whether it be in his own house, or in a theatre of anatomy, or in the house of any other person—a class of pupils, taking from those pupils the usual pupil's fee, and reading to them a lecture.

Now, say the gentlemen on the other side, provided this eminent surgeon, or anatomist, delivers his lectures to his pupils from a copy, he has a property in those lectures which he so reads; but if he orally delivers his lectures, in those he has no property. Now, my Lord, having drawn a distinction with respect to the law, I ask what is the distinction in the relative condition of the facts of the case, which are to authorize a deduction so diametrically opposite in point of law? If a man deliver a lecture orally, he must have taken the same pains and the same labour to compose it as if that lecture had been delivered with that preparation which a man makes previous to the delivery of a written Lecture—he must have studied Anatomy (if the lecture be on the subject of Anatomy), and must have gone through all the initiation and all the learning which give to a man the character and routine of knowledge in the science which he professes, which character and routine enable the pupil to acquire the knowledge of that science so delivered. I say, all the general rules must be gone through; he must have had the same labour—he must have made the same inquiry, and the same investigation, previous to the delivery of an oral Lecture as he must previous to the delivery of a written Lecture. And, therefore, my Lord, I say, the property is that which three of the Judges argued it was in the case of Taylor and Millar, which I take to be this; that a man has a right of property in his own intellectual labours; and let any man tell me what distinction there is, in reason, between an eminent surgeon, like Mr. Abernethy, who, for the last twenty or five-and-twenty years, has delivered Lectures at this Hospital—what distinction there is between his delivering an oral Lecture or a written lecture; and it is admitted that, although "he would have a property in the lecture, if it were delivered from a written copy, yet he would have no property in the same language and ideas, if they were delivered orally. It may happen that every man may not have the good fortune to be able to deliver a lecture orally; but if he should be so fortunate as to possess that talent, he is to be told that he has no property in his intellectual labours. And because he delivers his lectures orally, and not from a written paper, that is to take away from him all right to the property in his lectures. So that according to my learned friend's argument, before he could have a property in them, he is bound to commit them to writing.

My Lord, I must take the liberty of saying, as far as the reasoning of the thing goes, that I cannot present to my understanding, at least, a proposition more ludicrous than that you are to say to one man, "You have a property in your language and ideas which a court of equity will protect, and to another you have not." That is the way in which they shape their proposition. And to that proposition I reply the whole argument, the whole learning, and all the principles laid down by those most eminent men, (and more eminent lawyers Westminster Hall has never since been graced with,) who discussed the case of Millar and Taylor in the House of Lords; all of them asserting, that prior to and independent of the statute of Queen Anne, with which Mr. Shadwell was almost as much enamoured as he was with Captain White's dance, for I observed almost every sentence in the course of my learned friend's address to your Lordship, began and ended with the statute of Queen Anne; that independent of that statute the principle of law as entirely abstracted from it, and from the doctrine which did then exist and does now exist—independent of that statute all the learned Judges, with the exception of Mr. Justice Yates, subscribed to the doctrine that there was a property in a man's intellectual labours, and, consequently, that the right to that property had nothing to do with my friend's favourite statute of Anne.

The *Lord Chancellor*.—Did not Baron Parrot differ? If my recollection does not fail me, he delivered a very short judgment, and one of the strangest judgments I ever read. And I think the Chief Baron said, "the single question which he should trouble the House with on the operation of the statute of Queen Anne, was, whether their Lordships would say that the words, 'no longer,' meant for ever." That was all he said about it.

The *Solicitor General*.—Mr. Justice Yates was one of those who dissented.

The *Lord Chancellor*. The division in the House of Lords was eight and four.

The *Solicitor General*.—Those Judges who dissented from the others did not so much dissent on the question as to whether a property existed in the language and ideas of the author as they did on the question of identity; and this circumstance, namely, how long was the property to continue? They did not argue so much against the existence of the property as they did upon the difficulty of identifying it.

The *Lord Chancellor*.—That case was in effect this: if my recollection serves me rightly, that the existence of property was capable of being shown, provided there was a composition. I do not mean to say there was not a great deal of discussion upon the abstract principle.

The *Solicitor General*.—My Lord, I was adverting to the fact that the learned Judges who differed from the majority of the Judges upon the question, of whether the language and ideas of the author gave him a property that was capable of being protected, and that it did not so much depend on their denying the reasoning on which the other Judges supported the proposition of property as it did on this circumstance—they said, how long is it to last? Is it to last for ever? That, as it seems to me, was the ground upon which they dissented, namely, the eternity of the property; and they did not deny the proposition, that if a man had got together a mass of intellectual fruit, it was wrong to rob that man of that fruit.

The *Lord Chancellor*.—Do you recollect what volume in Burrows it is in?

The *Solicitor General*.—It is in the fourth volume, my Lord. They said, how long was the property to continue, and they added this circumstance, that no limit could be given to it; and that seems, on the ground of public policy, to have been the reason of their refusing to ascribe to the intellectual labours of an individual the character of property which the law would protect. I do not mean to say, in the course of the argument among those who reasoned the opposite proposition, that the fruits of a man's intellectual labour, *qua* intellectual labour, gave a man no right of property. I do not mean to deny, as my learned friend Mr. Horne has said, that that is not an argument which was used. But I do maintain that the ground upon which the Judges who there asserted the proposition of the existence of this property was, that they would ascribe to a man's intellectual ideas—to the fruits of his intellectual labours—the right of property without their being reduced to writing. I maintain that as the ground on which the property was said to exist. In the course of the argument, however, it was necessary to advert to the fact that there was a copy, as I read the case; but as I understand their reasoning, (and your Lordship will set me right if I am wrong on the subject,) I do conceive that the Judges there maintained the existence of a proprietary right in a kind of literary intellectual labour. I maintain that to be the basis and the principle of that decision—I say the basis and the principle on which their decision went was this: that the fruit of a man's intellectual labours was his own exclusive property. I allow, that they coupled with that what has already been observed upon in this case, namely, the identification of those ideas and sentiments, and your Lordship will presently give me credit for saying that, in this case, I do not leave that part of the proposition out of the question, namely, that if an individual asserts that his intellectual ideas and sentiments have been run away with by another person, undoubtedly he must identify the fact that those very ideas and sentiments in which he asserts a right of property have been run away with by that other person. Now the mode in which that may be done—the mode in which a man may reduce his ideas into a physical form is this: he may embody his language into a corporeal form, so as he may know that they are the ideas and sentiments of his mind, and that branch of the argument, my Lord, I shall presently advert to.

But, my Lord, I shall take the liberty of endeavouring to clear my way as far as the general principle goes, and the general principle, as I shall humbly contend in the case which your Lordship now holds in your hand, and which you are now having the goodness to look at, maintains me in the proposition that there is an existence of literary property independent of the Statute of Queen Anne, which does not consist in the embodying the intellectual matter into writing or into print. And, my Lord, if I am right in that, I humbly conceive that I have made a considerable way in the progress of that ultimate proposition which I am to establish. And, my Lord, that ultimate proposition is, in this case, a question of no kind of difference in materiality whatever: whether that intellectual proposition has or not on a particular occasion been committed by the lecturer to writing; or, in other words, that the distinction is immaterial whether the fruits of his labours and the energy, the collection, and ga-

thering of ideas and sentiments, which constitutes that science which he addresses to his pupils, that it is immaterial whether that delivery and communication to them be in print or in writing.

Now, my Lord, your Lordship will permit me to observe, that for the purpose of constituting what the gentlemen on the other side call a matter of title and property in a literary work, or any other intellectual subject, it must, as they say, be constituted either in the author's having committed it to writing, or in the author's having committed it to the press of the printer, in order to give it, what was expressed in the case of Millar and Taylor, a sort of physical existence. Now, my Lord, what I say is this, that the intellectual matter of a man's mind, whether it be committed to paper or not, that the sentiments, the figurative sentiments of his mind, are so far embodied in the shape of a lecture as they may be said (to use the language that was used in the case of Millar and Taylor) to have acquired a physical existence. And I observe one of the learned Judges, Mr. Justice Yates, a very eminent lawyer, in his argument as to the existence of literary property, asked, with a good deal of pleasantry, whether under a sheriff's execution, the sheriff could seize a man's ideas, or whether, under the extent of the Crown, what was passing in a man's mind could be forfeited and taken possession of under the extent of the Crown, or under a sheriff's execution? And certainly I do not mean to say, that there is not rather more weight than argument in that. That was the ground, my Lord, on which that learned Judge undoubtedly reasoned against the existence of literary property. He was one of those who differed from the other Judges on the question of the incompetency of acquiring a title in literary property. "However," say the gentlemen, "we will admit to you that you need not print your lectures in order to acquire a property or copyright in them; we will be content if you commit your lectures to writing;" but they go on to say, that a lecturer in a public chair of any university or in a private room, or any where else, if he happens to be master of a course of languages, and to be possessed of that flow of speech, that symmetry and method of composition, which enable him orally to deliver a complete lecture, that he must not superadd to his other talents the talent which some men have not, and others have, of being complete master of his own language. But the argument here, is, that if a man happens to superadd to his other talents the capability of delivering an oral perfect and complete composition—the argument is, that that immediately takes away from that man the property he would have in the same matter if it had been read from a written paper; so that because he has not reduced his ideas into a physical form—because he has not put them into writing, (although they are externally in a physical shape)—the right to them as matter of property is gone from him.

Now, my Lord, as I before stated, and as I take the liberty of saying again, I deny that to be the principle on which the case of Taylor and Millar was decided. As far as the statute of Queen Anne goes, my friend Mr. Horne left that at Stationers' Hall, where it ought to be for the present purpose; but my friend Mr. Shadwell, in every step he took, both began and finished his sentence with the statute of Queen Anne. My Lord, as to the copyright in printing we have nothing to do with that. My friend Mr. Horne, who certainly did come more to the point than my friend Mr. Shadwell, says my argument is, that "you have no right in this property, because you have not committed it to writing."

Now, my Lord, your Lordship will allow me to examine, practically, the ground of this distinction a little further. There may be several modes in which a person who delivers lectures to a class may deliver them: first, he may deliver his lectures completely in an oral mode of delivery; secondly, he may deliver them from a complete written manuscript; and, thirdly, he may deliver them in a middle form, between the two, namely, from notes, or the heads of notes, not extended into actual composition, but containing only the general matter to be discussed—the general proposition, or what may be called the outline of the Lectures, which may, by and by, be more completely filled up by the actual dilating—the actual spreading out which may take place in the course of the delivery.

Now, my Lord, I beg leave to ask this question: they say first, this gentleman, Mr. Abernethy, did not read his Lectures, and then they gave your Lordship, as their conclusion, that he has no property in them—not because they would be so much more valuable if they had been written—not because all the principles on which intellectual property existed before the statute of Anne—not because all the principles which were given by my learned friend Mr. Shadwell's favourite law, the statute of Anne—not because all these principles did not give him a property in them; but because, forsooth, he delivers his Lectures orally,

instead of delivering them from a written paper. My Lord, I have stated three modes in which lectures may be delivered; first, I say, they may be delivered completely orally; secondly, from a complete written manuscript; and, thirdly, from notes; and I suppose the gentlemen will tell me, that if he delivers them in the middle course which I have stated, that he has no property in them.

The Lord Chancellor. Mr. Solicitor, if that middle case is brought forward, it must be proved. I must see what is called the writing, before I can go on the notion that there is a writing.

The Solicitor-General. My Lord, I am about to argue the case on each of these modes of putting it.

The Lord Chancellor. You see you stand in the same situation here as if you were trying the action at law. These gentlemen certainly, according to their way of putting it, seem completely to have admitted that they have published Mr. Abernethy's Lectures, with all the peculiarities which belong to them, without any variation, and so on. Now, nine times out of ten, it would be one of the most difficult things in the world to prove that a long lecture, which was delivered orally, was the thing that was published.

The Solicitor General. My Lord, that circumstance is put at rest here by the admission of the fact, that these are identically his ideas and sentiments. I am quite ready to admit there would be the difficulty which your Lordship has pointed out in making out as a matter of fact, that the work of which the person complains was a piracy of his orally-delivered lecture; but that difficulty is completely removed by its being admitted, in this case, that they have followed his very words. It certainly would have been a very difficult thing for such a man as Mr. Pitt, or any other eminent statesman, to make oath that he had made use of the precise words which were reported in his speech. There is not a man, I think, who would undertake to do that; but here, my Lord, we have the fact, the question of fact admitted, that the words that fell from this gentleman, in the course of the delivery of his lectures, were his words, expressly his ideas and his sentiments; and we submit they are such as by law he has acquired a property in.

The Lord Chancellor. I believe, in point of fact, Mr. Solicitor, there are many persons who profess to speak extemporaneously who derive great benefit from notes, although they wish to have the credit of being thought not to speak from composition.

The Solicitor General. My Lord, the difficulty, however, which exists in identifying those ideas in which, as we say, the law gives a property, does not exist in this case. Difficulty upon that question there is none at all; because these gentlemen apologize, as it were, to Mr. Abernethy, not only for literally copying his lectures, but for copying his lectures too literally; and, if I may be permitted so to express myself, making him too much a copy of himself. They apologize for using the same particular expressions which, in the course of any person's peculiarity or style of writing, he might wish to avoid being made public. Therefore, my Lord, we have the fact, not only that these were the words delivered by Mr. Abernethy, but they apologize for using his particular expressions: they say he is really too much like himself; in other words, that they have traced his words so literally that they undertake to say they have given his very words and letters with the most minute accuracy.

Therefore, my Lord, I say upon the fact as to whether they have given the exact ideas and sentiments which Mr. Abernethy so orally delivered, (and which we do not here profess to say are not a copy of those words and expressions that a man of science would impart to his pupils) we have an admission equivalent, to saying Mr. Abernethy, you are not permitted to say we have not given your ideas and your words, for we have embodied in this publication your words and your sentiments exactly as they were delivered: they were taken down by a short-hand writer—although, we regret to say, we sometimes make you speak a language which you would very likely wish to correct; we have given Mr. Abernethy so completely Mr. Abernethy, that he must take his lectures with all their imperfections on their head, which in point of science may be complete, yet in point of grammar may not be so complete. But we have given the whole together, and that is what we profess to give. If, therefore, the argument is, that a man cannot have a property in an orally-delivered lecture, because in nine times out of ten he cannot identify the fact whether the composition, which professes to be a literal copy, or transcript, of his orally delivered lecture, is a copy of this orally delivered lecture—I say, in this case, that difficulty does not exist, because the defendants admit that the very words which Mr. Abernethy has used—that those same words have been put into their publication, whether through the medium of a short-hand writer, or by any other means, I do not stop to inquire; and

that they have composed for the press a literal transcript of every word and every syllable that fell from the lips of the lecturer.

My Lord, if that be so, we are relieved from the difficulty which sometimes takes place in cases of this nature, where it is necessary, in order to show that the work is a perfect copy of the original, to read over one with the other, and to see how many words, letters, sentiments, and syllables are taken from the original. But that is not so, my Lord, when it is orally delivered, because, in that case, unless a man makes an affidavit of every word he has used, it is impossible to ascertain whether it be a piratical work or not. But, my Lord, we have no such difficulty here. Well, then, my Lord, that difficulty being removed, I must beg leave to advert again to the distinction which it is said the law is to make, or which common sense is to make, between those proprietary rights which the policy of the state and the law of the land have given to an individual in the one case, and, as the gentlemen on the other side say, refuse to him on the other.

My Lord, I was going on to say, that in my apprehension this question involves a matter of considerable consequence, because it will apply to the composition of every gentleman in this country who preaches in the pulpit, which compositions are of the most valuable and fruitful nature, and no compositions are more admired by the public than that class of compositions, the right and title of property to which falls to the ground, if the principle which the gentlemen on the other side contend for be true. Because, according to their argument, a sermon delivered from a public pulpit, or a lecture delivered from the chair of a professor in the universities, must all fall to the ground, and be incapable of giving the existence of property, and will not be subject to the regulated principles of property, if the reasoning which the gentlemen on the other side apply to this case is well founded. It is very true, my Lord, that in the majority of instances, lectures and dissertations from the public chair of a professor, and I believe in the private lecture room of a man of science, in the exercise of what are called either his public duties or his intellectual pursuits—it is very true, that in a majority of instances those compositions are delivered partly orally and partly from a manuscript note, which was one of the cases I took the liberty of putting to your Lordship, namely, that lectures are sometimes delivered partly from written notes and partly from an oral delivery, and still less frequent is the case—perhaps less frequent—that they are entirely delivered from a written copy. I believe, indeed, although I do not know, that in most of the universities the practice is for the professor to deliver his lectures orally and not in writing, or, at least, in many they are so delivered, and, in that case, according to this argument of my learned friend, there ceases to be any property in them.

Now, my Lord, I will put this case: suppose, for instance, that Doctor White had delivered a sermon, in Saint Mary's Church, on the Sunday, and on Monday, in a book, not called the Lancet, perhaps, but the Evangelical Magazine (for I believe there is such a work as that) there had come out Doctor White's preliminary sermon, which the Doctor may have been two or three years labouring to compose, could it be said to that learned divine, "Oh! you have no property in that sermon—you have delivered that sermon orally—you have not thought proper to publish it yourself, and, therefore, it is not yours." So, on the other hand, might Mr. Abernethy say to the Editor of the Lancet, "You have been too hasty—you are not to give to the public, in eight-and-forty hours, that which has occupied me as many days to prepare; you must wait to know whether I will publish it or not." Instead of which, it passes through the circulation of the London press in the course of eight-and-forty hours after it has been delivered; for the first of these lectures was given on the 4th, and on the 9th, Mr. Abernethy, not choosing to embody his intellects into the form of a publication, out comes this publication, and then says Mr. Shadwell, with his favourite statute of Queen Anne, they have acquired the property in them, because Mr. Abernethy did not choose to out with his Lancet, and publish them himself. So that these gentlemen have only to say, we have just waited eight-and-forty hours, and now we will publish it, and then the copyright will be our property. Now then, I ask, my Lord, do the gentlemen mean seriously to assert, that the author, under those circumstances, is to be deprived of the property which he has in his intellects, because he has not reduced them into writing, or printed them himself? Because if they do, this monstrous absurdity must take place, that that man who first reduces the ideas and sentiments of another into writing or printing acquires the copyright, and, if that be so, instead of this gentleman's filing a bill to restrain The Lancet from publishing them, they may turn the tables on him

and say, "We have got the copyright, because we are the persons who first embodied your sentiments into writing or into print." That is the monstrous proposition which my friends, on the other side, contend for, and the consequence of that proposition leads to this, that if a man delivers a lecture orally, and has not time to put it into writing, or is not even asked whether he will put it in print, or put it abroad, he is to be deprived of the property which he has in that lecture. And then when he makes his complaint, he is to be told, "You have not the copyright—we have the copyright—the copyright is ours—we are the persons who first ran away, with breathless haste, to the short-hand writer, and got it reduced into print." Now, my Lord, if they were to have the opportunity of replying to me, I know the ability and ingenuity of my learned friend, Mr. Horne, in all his arguments, and particularly in his logical arguments, he would argue—his proposition would be—that Mr. Abernethy has not the copyright in his book, because he has not first published it. The necessary and unavoidable consequence of that proposition is, that the Editor of The Lancet has acquired a copyright in the works of a lecture, which he may publish *ad libitum*, and the same extravagant consequence—the same necessary consequence—would follow with respect to a professor in the chair at the universities, for by the same rule he might be told that he had no right in his lectures.

My Lord, it is on these grounds, I say, whether you look to the law on the subject, or whether you look to the reason of the thing, or the good sense of the thing, or whether you look to those principles of public policy, on which the common law gives this right of property, and as it was followed up afterwards by that benevolent, (I will not say benevolent, but by that) statute which gives such complete justice to authors—it is on these grounds, I say, that every one of these principles are blotted out, and this consequence must follow, that whether a lecture be orally delivered, or not orally delivered, there is to be better justice done in the one case than there is in the other; for in the one case there is a right of property, and in the other case there is no property at all: and it must be followed up with the still more grievous consequences, that as against the individual himself, *nolens volens*, the original lecturer, he might not, but some other person might, acquire a property in his lectures.

Now, my Lord, the gentlemen have said—Mr. Horne, in the first place, and then Mr. Shadwell, who followed him, "Oh, but you must go to law.—Why do you not go to law?" Now, my Lord, I apprehend that is not the doctrine of this Court, if your Lordship is satisfied that the subject matter complained of is identically Mr. Abernethy's, which is, *ex concessus*, the way in which his case is to be taken, (and that is a thing which is not capable of being disputed.) I apprehend there is no more reason for your Lordship sending this to law, than there is any other case where the fact of waste or trespass is admitted, or any case which calls for the power of this Court to grant an injunction. Well then, say the gentlemen, this precise case has never occurred in the history of literary property—in the history of those various actions in which the powers of this Court have been called into action by injunction—this particular case has not occurred. My Lord, in my apprehension it has occurred in other cases, and if I may so express myself, I think the arm of this Court has extended itself further than it is required to do now. In my apprehension there has been a case of literary property, and a much stronger case than this, in which a Court of Equity has protected the right of literary property.

The Lord Chancellor.—In the case of letters, the Court held this with respect to the question of property, (and it is enough for me to say, I have found it so decided long before I came into my judicial situation)—the Court has held, where one man writes a letter to another, that he still retains a property in that letter; that there is a qualified property both in the writer of the letter; and in the receiver of the letter, and that the receiver of the letter cannot, without a violation of that reversionary interest in the property, publish the letter. Whether that doctrine originally was right or wrong, and whether it can be supported by strong reasoning, or cannot be supported by strong reasoning, is, I apprehend, what a judge of this day is not to trouble his mind about. As I find the law, so I must proceed to administer it, although it may be a little difficult perhaps to understand it.

The Solicitor General. That principle is the settled principle of the Court, and not only the settled principle of the Court, but is enforced in point of practice.

The Lord Chancellor. It was on that principle I acted, just before the long vacation, with respect to some of Lord Byron's works.

The Solicitor General. That principle has been established by most eminent

individuals sitting where your Lordship now does, and of course I shall avail myself of that principle to the extent to which my argument can be aided by it; and, according to my apprehension, this case falls very much indeed within that principle, and that the sort of power which the Court exercised there is the sort of power which has application to the present case.

My Lord, I was going on answering the argument of the gentlemen on the other side, particularly of Mr. Shadwell, who would have us bring an action. Now, my Lord, the answer I give to that argument is, that I should doubt very much whether an action could be brought on a letter; if it could, it could only be on the ground that the Court of Chancery had made it such a species of property as that an action could be brought upon it; and I apprehend, on principle, that will be found to be rather against the rule of a Court of Equity, considering the relative situation of the writer and the person to whom it was sent. Then, my Lord, I say, although the circumstances of the case may be new in species, yet it is immaterial, if the principles on which the case founds itself are really the settled principles of a Court of Equity.

My Lord, I shall not travel through the cases which my learned friend Mr. Rose has gone through so accurately; there are, however, some which seem to me to approach very near to this case, for instance the case of Doctor Paley's Sermons: there is not a full report of that case; it is alluded to in a note in the second Vesey, and I have not a sufficient recollection of what passed on the discussion of that case to undertake to represent to your Lordship on what ground the protection of this Court was given in that case. According to my recollection of that case, Doctor Paley expressly mentioned in his will, that he intended his sermons to be published after his death.

The Lord Chancellor. That case, I recollect, went no further than this: he conceived he had a right to the copyright of his sermons; there were several which he had not published in his life-time, but previous to his death, at the time of making his will, he, conceiving that he had a right to give these sermons to the world, he thought proper, recollecting the duty which he owed to his parishioners, in his will (if my memory does not mislead me) expressly to direct that they should be published for the use of his parishioners, and the question was, what was the effect of that publication?

Mr. Rose. There is a note of that case in being, but there is no full report of it.

The Solicitor General. My Lord, I have noticed in part what Mr. Shadwell in his argument called an excession of the law: he said he hoped your Lordship in this case would not exceed the law, because the case itself was new. Now, my Lord, as far as regards the right of property in this case, I apprehend in this case we are now only calling on your Lordship to carry that law into effect which has so long existed in this Court; for, my Lord, I mean to take the liberty of stating, that, in my apprehension, the right of property in this case depends on that principle which has been so long established in this Court, with respect to the property which a man has in a letter. Now upon what ground is it that the Court says to the person to whom a letter is addressed, "You shall not print that letter." What is the ground on which the Court says that? And I apprehend I am using correct language, when I am using the language of my Lord Chief Baron Smith, on the occasion, and the language of my Lord Northington, and, I believe, almost every Chancellor, including your Lordship; for I believe, in every case that has occurred, those who have sat where your Lordship is now sitting as Chancellor, have not only followed that doctrine, but have decided on the adoption of that doctrine. I am, therefore, not talking of this as a precedent upon which there is a doubt as to its recognition, for it is the confirmed doctrine of the Court, and the principle is this, that when a letter is sent to a person, the person to whom it is sent, although he has a special property in it, yet he has not such a property as will give him a right to publish it; but the doctrine of the Court is this: it is sent to you for a particular purpose, and you shall not use it beyond that purpose. Now to apply that doctrine to the case of a sermon, let us see how the case stands: does not a public lecturer, who reads a lecture to his pupils, or a private lecturer, who delivers a private lecture to a private class at his own house—does not he impart that science to his audience precisely on the same terms as a man who writes a letter to another? That is to say, "You may read the letter—you may look at the letter in order to see what knowledge it imparts to you, and you may use the letter for all the purposes for which it is sent." So I say to these gentlemen, "You may use these lectures for all the purposes for which they are intended. You may take copies for your own pleasure and your own private instruction and reading, and you may take notes, or if you can, you may even write them down

in short hand, but before you can use them for any purpose beyond that, or before you can be said to have acquired any more special property in them than in the case of a letter, you must show that you have a special property in those lectures *quoad* the person who delivered them.

Mr. Horne. The Court will understand, that we are not the students.

The Solicitor General. I know that Mr. Horne, and if my learned friend's recollection will serve him, he will recollect that in my opening of the case I stated them to be nothing more than the publishers.

My Lord, on this part of the case I find, in our affidavit, and we cannot allege the fact more distinctly than we have done, that the supposed publication took place in this way; he says that he delivered his third lecture on Monday evening, the 11th of October, and that at that time the circumstance of the publication of the first and second lecture of the deponent, in the manner aforesaid, had been communicated to the deponent, and the deponent took occasion, in the course of the delivery of the third or ensuing lecture, to express to the class assembled at the said theatre his disapprobation of the said publication, and to protest against the same, believing as the fact was and is, that the deponent's lectures had been taken down in short-hand, by some person or persons attending the said class, and afterwards published by, or with the direction or consent of such person or persons, and that he called upon such persons or person to avow himself.

Mr. Horne. We swear that on two or three occasions the lights were put out.

The Solicitor General. My Lord, according to my apprehension, it is quite immaterial whether it be the pupils, or the booksellers, or the printers, who obtain their livelihood by a mode which I am not here at all to disparage or discountenance, not wishing to restrain the fair use of the press, or the opportunity of diffusing knowledge by the press. I complain not against those persons who attend at different places for the purpose of furnishing information to the publications of the day, but of those which constitute the magazines and other works, which are sent forth to the public. That is not the ground of my complaint at all. And I say, my Lord, we are indifferent as to the hand which took down these lectures in short-hand; and I think it is quite clear, from what is stated, that it was done so, unless it were possible to suppose that a man had memory enough to carry every word of Mr. Abernethy's Lectures; and that, when he had so carried them away, he could put them into writing with the accuracy with which it is admitted these are reduced into writing. I certainly have heard of a man, who was capable of reading a whole work and then repeating it. I have heard of a man, who could read the Morning Chronicle, and then repeat every word of it; but whether the person who attended at these Lectures had such a memory as to enable him, after hearing these lectures delivered by Mr. Abernethy, to reduce them into writing, or whether he had so good a memory as this Morning Chronicle-man, I do not know. The probability is, that they were put down in short-hand.

Mr. Horne. My Lord, so far as the argument proceeds on this ground, your Lordship will forgive my calling your attention to the fact, that it is sworn in our affidavit, that on two occasions the lights were put out, and therefore it could not have been done in short-hand.

The Solicitor General. Well, my Lord, be that as it may, these lectures are reduced into writing, and I say, unless the persons who composed The Lancet are to have the credit of being possessed of such a memory as actually to enable them to reduce into writing every word and every thing that fell from Mr. Abernethy's lips, the conclusion which I come to is, that these lectures were taken down in short-hand. It is not very material in what way they were taken down, though it is more probable that some person attended and reduced them into writing.

My Lord, in this case then, they being reduced into writing, I say they are not to be carried further than the right or privilege which a person has to whom a letter is sent, with respect to the use to be made of it. Now, if I am right in that, I cannot waive my title as it stands on the question of property. That is the first ground. Nor can I, when your Lordship has yourself laid down the principle which will authorize me in putting this case on the second ground, waive my title to the second, which is that it is a breach of trust: that it is making an improper use of the property in which the author has a special definite property, contrary to the use and purpose for which the donor of that property meant it to be used, and contrary to the principle of good faith.

The Lord Chancellor. I think if you look at the affidavit of the defendant you can hardly doubt that it was some student who delivered it to these persons the publishers.

Mr. Horne. I am counsel only for the publishers, my Lord.

The Solicitor General. If a distinction is to be taken between an editor and a publisher who goes into a lecture room. If an editor is not bound by any of these principles of good faith, or if he is not bound by that doctrine of special property which exists between the writer of a letter and the party to whom it is sent; or if the editor of a journal is bound by none of these principles of good faith, or if he is bound by none of those conscientious rules, by which a court of equity in this country is to be governed, then he is not of that class of individuals to which the rules of this Court will extend.

The Lord Chancellor. How have you charged the fact in the bill, as to the means by which the power of publishing was acquired? Have you charged it as against the students?

Mr. Horne. My Lord, on that subject we are in the dark, because the lamps were put out.

The Solicitor General. I don't see that we state how it was done, my Lord.

The Lord Chancellor. What is the prayer of the bill?

Mr. Rose. The prayer of the bill, my Lord, is for an account and for an injunction.

The Lord Chancellor. That is calling on the court for an injunction in terms as general as any you can use. Read the prayer of the bill.

Mr. Rose. The prayer, my Lord, is, that an account may be taken, by and under the direction of the Court, of the profits derived by the defendants, any or either of them, from the sale of surgical lectures delivered by the plaintiff—That they may be restrained, by the injunction of the Court, from printing and publishing any other work or works, publication or publications, being or purporting to be lectures delivered, or to be delivered, by the plaintiff as aforesaid; and also from reprinting and republishing the surgical lectures, or any works or work, publications or publication, being or purporting to be delivered by the plaintiff, or any or either of them.

The Solicitor General. My Lord, certainly our affidavit does not swear that these gentlemen, the editors of The Lancet, published this from a copy, or from any communication delivered to them by a pupil. It does not so state.

The Lord Chancellor. It is extremely probable that some short-hand writer slipt into the room unobserved and took down what passed; but it is certainly a little difficult to account for the transaction on those nights when the candles were extinguished. I don't know how these short-hand writers manage in the dark; but they thought it would put an end to the piracy by putting out the lights.

Mr. Rose. The allegation in the bill is, that on Monday evening, the 4th of October 1824, the plaintiff commenced the delivery of a course of lectures on the principles and practice of surgery at the theatre of Saint Bartholomew's Hospital, to the pupils of the plaintiff, and to the students and persons desirous of acquiring a knowledge of surgery, and who, previously to the commencement of the said intended course, had respectively been admitted by the plaintiff as attendants upon such course, and had signed their names respectively in a book provided for the purpose, and had paid to the plaintiff the fees for the privilege or permission of attending the same. And then the affidavit states, that the deponent took occasion, in the course of the delivery of his third lecture, to express to the class assembled at the said theatre, his disapprobation of the publication, and to protest against the same, the deponent believing, as the fact was and is, that the deponent's said lectures had been taken down in short-hand by some person or persons attending the said class, and afterwards published by the direction or consent of such person or persons. So that it connects them with being concerned in the publication.

The Solicitor General. My Lord, in my apprehension, the case would be a degree stronger, and only a degree stronger, if we proved that the lectures in question had been taken by a student in short-hand. I am now looking at these gentlemen as strangers, but still, my Lord, I say, that part of the case is not to be given up, because, on further inquiry, your Lordship will have a right to know from these gentlemen, whether they came into this lecture room in the character of what I call trespassers, or strangers, to take notes there, or whether they got these notes from the pupils. That, my Lord, is a question which, in a further stage of the case, we may have a right to have ascertained, if your Lordship shall be of opinion that any further light should be thrown upon the subject. But, at present, I am only reasoning the case and taking these gentlemen as strangers. The argument on the other side is, that they are at liberty to print an orally-delivered lecture, though they cannot print a lecture which is delivered from a written copy—that is the law of both my learned friends. Now, my Lord, I conceive I have already answered their argument as far as it relates to that

part of the case, for it appears to me, at least, that it is utterly impossible to draw a distinction between a man's reading a lecture in a room, and saying to his pupils you may take a full copy for your own use but you shall not print, and the case of an oral lecture.

My Lord, I feel that I have already occupied too much of your Lordship's time, and certainly more than I intended to occupy, and consequently I shall say but little more on the subject. My Lord, with respect to Mr. Elliston's case, which your Lordship has referred to, I certainly have not been able to learn what became of that case.

The Lord Chancellor. I am pretty sure the judgment of the Court of King's Bench has been given in that case.

The Solicitor General. But, my Lord, unless I err, there existed a difficulty in that case, which does not exist here, and a peculiarity of an extremely different nature; for unless I err, the work of which Mr. Elliston complained, the dramatic performance of which he complained of a piracy, was not an original work, but a translation from the French, and the question was, whether two persons had translated the French in the same manner; and if that be so, no such question arises in this case.

The Lord Chancellor. I thought Mr. Elliston, in that case, had proved by affidavit that some person had gone into the pit, and had taken down the words from the mouths of the actors—some short-hand writer.

Mr. Horne. It was not the same, independent of the translation.

The Solicitor General. Thus your Lordship sees there was a doubt in that case, which does not exist here; there the doubt was, whether Mr. Elliston's translation from the original work gave him a property in the drama; but that is not the case with respect to Mr. Abernethy's lectures, because it is not a matter of doubt here whether this publication be not identically a publication of Mr. Abernethy's Lectures; that, as a matter of fact is conceded to us, and therefore we are not embarrassed with that difficulty here. Where there is a difficulty of that sort, the party complaining of the piracy must prove the proposition of fact; but here, as I stated before, the existence of Mr. Abernethy's lectures *qua* Mr. Abernethy's lectures is a proposition of fact that is sworn to by him, and conceded by the other side. I think Mr. Elliston's case did not turn on the question, whether your Lordship could or not, by your injunction, reach an exhibition of that sort—whether it was tangible by this Court or not; that was not the question, but the question was, whether, in point of fact, the party against whom he complained had run away with Mr. Elliston's translation or not? My Lord, I do humbly conceive that the question in that case was a preliminary question of fact, whether the translation which he complained another man had run away with, was identically Mr. Elliston's translation.

The Lord Chancellor. Do you recollect, Mr. Solicitor General, what the Court did in the first instance in that case?

The Solicitor General. My Lord, in that case my friend Mr. Rose reminds me, and my recollection concurs with his, and indeed I am quite certain of it, that there the parties against whom the piracy was levelled said, I am the person who did accurately translate it; mine is the correct translation, and yours is not.

The Lord Chancellor. That does not answer the question I have put to you. I am quite sure, when the motion was before this Court, there was nothing about a different translation. The question, as far as my memory serves me, when it came before me, was, whether this theatre, on the other side of the river, had not employed some short-hand writer to go into the pit of Covent Garden, or Drury Lane, and that short-hand writer had taken down the words from the mouths of the actors, which words they of course took from some composition which instructed them what they should say on the stage. Now what I want to know is, what I did in the first instance in that case? Did I grant the injunction in the first instance, and direct an account to be taken, or did I send them to a trial at law in the first instance: that is what I want to know. I have on my own memory a sort of impression, that there is a report of that case. My notion of the law was, that that could not be done; but I did not venture to go the length of saying, in a legal question which had never been decided in a Court of Equity, that I should, in such a case as that, in the first instance, act on my notion of the law. I totally forget what was the first order I made on that.

Mr. Rose. I don't think it is reported, my Lord.

The Lord Chancellor. I thought I had seen it in one of the Term Reports of the King's Bench Reports, or that I had seen some account of it somewhere or other.

Mr. Rose. We were aware of the existence of that case, and I made some inquiry on the subject, but no satisfactory information was delivered to me.

I believe your Lordship is correct in stating that the plaintiff did come into Court, upon the ground your Lordship has stated: what was done on it I do not know, but I believe it was afterwards put in this way: I am the translator as well as you, and in that way it was put to the Court.

The Solicitor General. My Lord, I have now closed all the observations I have to offer in this case, and I trust, your Lordship will be of opinion, for the reasons I have stated, that there is no distinction to be drawn, in point of law, between an orally-delivered lecture and a written one; and under all the circumstances of the case, I trust, your Lordship will be of opinion that this Injunction ought to be granted.

The Lord Chancellor. The very early part of this case turned entirely upon the question of property, and this view of it was hardly touched on when the subject was originally introduced to the Court. The defence, unfortunately, which was made for the defendant, was not much applied to that view of the case. If the question be a question of literary property, it can only be viewed in two ways—either as a question of property or a question of trust. In the first place, I have nothing to do with all the considerations that have been pressed on me, as arising out of the benefit which the public may receive from the publication even of such lectures as those which so distinguished a man as Mr. Abernethy might publish, or other persons might publish for him; and, in the next place, I have nothing to do here with the moral question of how far the person, who is the editor of this work, has righteously possessed himself of the means of publishing it. And when I say with the moral question, I mean to qualify it, because, if I can collect that it has been obtained either by a breach of trust or by fraud, this Court may have something to do with it.

With regard to the question of literary property, I am obliged to recollect that I have no right to interfere by injunction unless I have such a strong opinion—(and that opinion ought to be very strong)—unless I have a very strong opinion that the legal right is with the plaintiff. Now, when one looks at all that has passed with respect to the delivery of the property, and particularly with respect to this case of Millar and Taylor, which has been first before the Court of King's Bench and afterwards before the House of Lords, (though there has been a vast deal of argument on the question of what sort of property a man may have in his unpublished ideas or sentiments, or the language which he uses,) yet I don't recollect, in the course of those proceedings (particularly in the House of Lords), that any question whatever was put to the Judges that did not adapt itself to the case of a book or a literary composition—whether a person had any right in a book or a literary composition; and, however well that point is now settled, undoubtedly there was a great difference of opinion upon it at that time; for I find on the questions which are there put to the Judges, and there are three of them in number, the first was, Whether at common law an author of any book or literary composition had the sole right of first printing and publishing the same for sale, and might bring an action against any person who printed, published, and sold the same without his consent? The next question was, If the author had such a right originally, did the law take it away upon his printing and publishing such book or literary composition, and might any person afterwards reprint and sell for his own benefit such book or literary composition, against the will of the author? And the third question was, If such an action would have lain at common law, is it taken away by the statute of the eighth of Anne, and is an author, by the said statute, precluded from any remedy except on the foundation of the said statute, and on the terms and conditions prescribed thereby?

Now on these questions it appeared the Judges of the land differed so much as that, on the first question (eleven of the Judges giving their opinion, Lord Mansfield not giving his opinion he being a Peer of the House) there were eight to three; but it should be recollected, in that case, that the names of two of those three dissenting Judges are names which will long be remembered as the names of persons of great eminence in their judi-

cial character—I mean, Mr. Baron Eyre and Mr. Baron Parrot; and the very strong opinion which was given on one, by Mr. Baron Parrot, which was this: that he was of opinion (and a very difficult opinion it always appeared to me to maintain, though no doubt he had a very good reason for it)—he was of opinion that, at common law, an author of any book or literary composition had not the sole right of first printing and publishing the same for sale, and that he could not bring an action against any person who printed, published, and sold the same, unless such person had obtained the copyright by fraud or by violence.

So that, although he was of opinion that at law the author was not the party who had the sole right of first printing and publishing the same for sale, yet he was of opinion, that to give him a right of action founded on that right of first printing and publishing the same for sale, it was necessary, in order to maintain an action, to be shown that the person who had first printed and published had got it from him either by violence or by fraud; and I am quite ready to admit there is no difficulty at all in that. If it can be made out as matter of contract between Mr. Abernethy and those who attend his lectures, that they should *not* be at liberty to print or publish the same, I should say then that taking notes—short-hand-writer's notes, which would be a complete note of all that he delivered in his lectures, even supposing it to be a proper thing for the use of the students, yet if it can be made out as matter of contract that these students or pupils were not to publish them—I never would permit, in a court of equity, a third person to make use of the delivery of those notes to that third person for the purpose of doing that which the person delivering those notes would not himself be permitted to do. I should call that, in the sense in which a court of equity uses the word—I should represent that as being certainly not violence, and it is a very difficult thing to know how a man's words can be pulled out of his mouth by violence—but undoubtedly I should call that a gross fraud in this court.

With respect to the other questions, it should be recollected that the decision of the Judges was in this way: upon the second question, seven were of one opinion and four of another; and on the third question, five of the Judges were of one opinion and six of the other. Now, in this case, which went to the House of Lords, it did not become necessary to decide all the questions put to the Judges, though it would have been very well perhaps for the profession if all the questions had been decided; but the question which was actually decided in the judgment was, that the party had no right for ever, under the statute of Queen Anne. And, with respect to that, some of the Judges thought the statute of Anne *did not* originally give the right, and others thought that statute *did* originally give the right—but the case before the House of Lords decided no more than this: namely, that supposing that statute did originally give the right, for how long did it give it; and, that being settled, all the other points were out of the question.

Now, in the case which is now brought before me, Mr. Solicitor-General has divided it, with respect to its connection with writing, or with respect to its not being connected with writing, in these two ways, as I take it. He says that Mr. Abernethy has a composition, which, in the language of this case, one would call a copy or a writing, which contains the whole of what this person has published. And then he says, if he have not (and if you are to expound his affidavit, as you may, I think, very honestly, and with due attention to him, expound it), that he delivered it as from writing, and therefore he must be understood as having some notes which were to suggest to him, from time to time, what sentiments to deliver orally to the persons who attended his Lectures.

Now, with respect to either of those views of the case, I apprehend, when this Court is called on to enforce a legal right, by giving a remedy beyond that which the law gives, it is the bounden duty of this Court, be it in what case it may, to see that the plaintiff *produce his written composition*; and, therefore, if this case be to be put at all on the right which Mr.

Abernethy is supposed to derive from his having a full and correct copy, there must be an original, or a writing which contains all that has been published in this book, or he must have a writing which is such in its nature as that, coupled with what he orally delivered, it may be taken that he has substantially a written composition, as well as that which he delivered orally. And then, I apprehend, the same observation arises here again, namely, that, when this Court is called on to give a remedy beyond the remedy which the law gives to persons who have a legal right, *the Court must know what it is proceeding on;* and if the case be put, either that there is a writing of one character or a writing of another character, *that writing must be produced*, that this Court may know what it is doing. And I won't shut out of my consideration the question, as to what the nature of that writing may require to be done by the Court, but, if Mr. Abernethy think proper to exhibit that writing to the Court on Monday morning, I will look at it with a view to see what shall be done. If, on the other hand, that writing be not produced, and I am applied to, I must then look at it, I mean in a judicial view, as an application made to me merely on the ground of an oral publication, and then the question of property will arise, coupling it with the doctrine of trust and with the doctrine of fraud.

Now, in the first place, it is said, that Mr. Abernethy is not to be looked on as holding the same character with reference to a subject of this kind as a clergyman of the country, or a professor in a university, or in some other of those characters which have been mentioned. Now, as I understand the affidavit which has been filed on the part of the defendant, Mr. Abernethy is represented in that affidavit, not only as a surgeon, but as a person who *is* to give lectures, and a person *appointed* by the governors and guardians of this hospital *to give lectures*. I think it is so stated in the defendant's affidavit.

The Solicitor General. It is not carried quite so far as that, my Lord.

The Lord Chancellor. When there is any doubt it is always best to refer to the affidavit. His Lordship then referred to the affidavit, and said, It is exactly as I say: "And this deponent saith that the surgeons and lecturers for the time being of such hospital are, as the deponent believes, appointed by the governors of the said hospital."

Mr. Horne. We say a surgeon is a lecturer.

The Solicitor General. And we say surgeons and lecturers are distinguishable.

The Lord Chancellor. I do not apprehend it would at all follow that there could be an interest in literary property because it was a man's duty to read a lecture, or a clergyman, or an incumbent of a living whose duty it is to preach a sermon in a pulpit. And if a professor be appointed, he is appointed for the purpose of giving information to all the students who attend him, and it is his duty to do that; but I have never yet heard that any body could publish his lectures, nor can I conceive on what ground Sir William Blackstone had the copyright in his lectures for twenty years if there had been such a right as that. I remember perfectly we used to take notes at his lectures, and also at Sir Robert Chambers's lectures the students used to take notes; but it never was understood that those lectures could be published; and so with respect to any other lectures in the university where it is the duty of persons to give those lectures; but, on the other hand, it never was understood that those lectures were capable of being published.

Now if, therefore, this injunction be applied for on the reasoning to be found in the case, not on what was done, but on the reasoning to be found in the case that has been alluded to—then all I have to say on that is, it is incumbent on the Judge (though in many cases it may not be necessary to decide the legal question)—it becomes a Judge in Equity to look about him before he takes on himself to decide the legal question. And if that legal question, in the shape in which it is now put, namely, as an oral delivery of ideas and sentiments has occasioned so much abstruse learning, yet, as in the case which I have alluded to, the Judges of the land in the first instance, and the House of Lords

in the last instance, avoided giving any opinion upon that question when it was discussed, in that case certainly it becomes me to know what opinion a court of law would give in such a case as this, before I venture to grant the injunction in unqualified terms.

The last case we have before us, I think, which related to the publication by a medical man went quite on another ground. I cannot now refer to it (as my memory, perhaps, in some respects fails me), but with respect to that case, I can say, after having considered that case again and again, and read all that has been published with respect to it, that the decision I gave in that case was the very decision which, if that case were to come again before me, I should give without any hesitation. I believe that judgment is in strict conformity with the principles upon which the Court always acts. And I take the liberty of saying in terms, but with all due respect certainly to those eminent persons who dispute the propriety of that judgment, that it does at this moment appear to me they are unacquainted with the doctrine of this Court with respect to injunctions of that nature.

Now having said so much with respect to the question of literary property, looking at the difficulty which belongs to a case of this kind, provided there is the right which is now contended for—the difficulty there is, nine times out of ten, in sustaining these actions, for want of proof; because if a lecture can be published which has been orally delivered—if that can form the subject of an action though it be only orally delivered, yet there is great difficulty in the proof, because how it is possible to prove unless the Court is to be satisfied with something like the substance of what was said—how it is possible to prove that the printed publication was parcel of the oral publication—is very difficult to represent. In this case there is no difficulty about it, which is another reason, perhaps, that ought to induce the Court to be a little cautious in what determination it comes to. Because this editor has, in the most distinct manner, admitted in his publication, and what is admitted in the publication must be taken in this Court to be true as against himself—he has admitted in the publication that what he has so published was orally delivered by Mr. Abernethy. The difficulty of proof, therefore, to which I have alluded, is not found to exist in this case. Indeed there are some few expressions of a familiar nature which learned men like Mr. Abernethy may now and then make use of, and which are themselves stated, by this editor, as identifying his publication with what Mr. Abernethy did so orally deliver. So that there is not that difficulty in this case.

Mr. Solicitor General has put a very strong case, namely, that if a person delivers orally a lecture or a sermon he says the copyright is to belong to the person who first publishes it, although he was not the person who orally delivered it, but he or some person taking notes for him, was the person who first published it. In the first place, I take notice of that for the purpose of saying, that I desire nothing that falls from me to-day may be understood by the gentleman who publishes this work called The Lancet, as intimating my opinion that he has any right to publish it. I do not mean to prejudice the thing one way or the other. It is one thing to contend that, because it has not been established that a person who orally delivers lectures has that species of property in them as that he may bring an action, and after having succeeded in the action may apply to have an injunction here, either with or without an account to be kept in the mean time of the profits of the work—it is one thing to say that that proceeding cannot be maintained, and another thing to say, that a person who has so possessed himself of the means of publishing what the author, if I may represent a person as an author who has delivered lectures which are hereafter to be put into writing, and which he may or may not mean to publish—is quite a different thing to say, that the person who has so possessed himself of the means of publishing has himself the copyright of what he does so publish. Now, at least as regards myself, that it may not be supposed I sanction that doctrine, I beg to have it understood that I do not give any such opinion.

Mr. Horne.—Nor is it so put, my Lord.

The *Lord Chancellor.*—That again is another consideration, which, in one view of this case, I think, the Court is bound to look at; because, if the editor of this publication called The Lancet be not only himself at liberty to publish five thousand copies of this work, but five thousand other persons (notwithstanding his pretence of having the copyright of this publication called The Lancet) may likewise publish the work, that would go directly to destroy the value of any property, if any property Mr. Abernethy have in the subject. And that leads me again to another view of this subject, which is, whether, if I do not grant the injunction on the ground of literary property, you are or not (I withholding the injunction) to make a market of any thing to be done in the mean time, until I shall be enabled to do justice between the parties—whether I ought to direct an account to be taken until it be seen whether Mr. Abernethy can support his right at law. I think these are all the views of the case, as far as they go to the question of literary property.

With respect to the question of trust, a good deal as to that must depend, not only on the nature of these lectures and so on, and the rights and obligations which those persons are under to whom they were delivered abstractedly; but it must depend also (indeed very materially) on the affidavits that have been actually filed, and, with respect to the affidavits that are actually filed, in as much as I have given you till Monday morning to tell me whether Mr. Abernethy thinks proper to produce these writings or not, so, on the other hand, I give leave to the defendants to judge for themselves whether they will or not, on the same Monday morning—and I do not require it of them, because I have no right—inform me how they became possessed of the means of publishing this work, with a view that I may consider what can be made of the argument of trust, or made of the argument founded on that which Mr. Baron Parrot embodied in his opinion, fraud—and on Monday morning I will dispose of it.

MONDAY, DEC. 20.

Lord Chancellor. Now are these writings to be produced in that case of The Lancet?

Mr. Shadwell. No affidavit has been made, my Lord, by Mr. Abernethy, and therefore the case rests exactly where it was.

Mr. Bourdillon, (Solicitor for Mr. Abernethy.) My Lord, I have got the papers your Lordship requested to see.

Mr. Horne. What?

Lord Chancellor. This gentleman says the papers are here; I don't know whether you have seen them or not.

Mr. Horne. No, my Lord, certainly we have seen no papers.

Mr. Bourdillon. No, my Lord, they are the private papers of Mr. Abernethy, which I understood your Lordship wished to see for your own information.

Mr. Horne. What are you saying, sir, to my Lord Chancellor?

Mr. Bourdillon. I am only saying that I have got the private papers of Mr. Abernethy, which I understood his Lordship wished to see for his own information.

Mr. Horne. But are they verified by affidavit? Unless they are verified by affidavit his Lordship cannot look at them.

Mr. Bourdillon. I did not understand your Lordship to say that they must be verified by affidavit.

Lord Chancellor. O, but I can't look at them unless they are verified by affidavit.

Mr. Bourdillon. Then I am sure, my Lord, I did not so understand it on Saturday, nor was it so understood by the counsel.

Mr. Horne. I am quite sure that there could be no misunderstanding respecting any thing your Lordship said on Saturday. Your Lordship distinctly gave them leave to produce the papers this day, if they thought proper, verified by affidavit.

Mr. Bourdillon. No, my Lord Chancellor did not use the word affidavit.

Lord Chancellor. I don't recollect that I said any thing about affidavit.

Mr. Bourdillon. Certainly not, my Lord.

Lord Chancellor. I don't recollect it, and therefore the Gentleman is not wrong in that respect; but unquestionably I cannot receive them as

writings from which the book is published, unless I have it stated by affidavit.

Mr. Bourdillon. Then, my Lord, there shall be an affidavit made that these were written previously to the Lectures being delivered. Is that what your Lordship wishes?

Lord Chancellor. Yes.

Mr. Horne. Between this and when? I hope we shall see the affidavit, because it may be very material that we should see it.

Mr. Bourdillon. As soon as I have made the affidavit I shall hand a copy of it to you.

Mr. Horne. As soon as *you* have made it!

Mr. Bourdillon. When I say, as soon as *I* have made it, of course I mean as soon as Mr. Abernethy has made it.

Lord Chancellor. Can't it be made this morning?

Mr. Bourdillon. I am afraid not, my Lord. Mr. Abernethy will be so much engaged that I am afraid it will be quite impossible to get it made this morning.

Mr. Horne. My Lord, we had better not have any thing stated which is not on affidavit.

Mr. Bourdillon. I am not stating any thing, Mr. Horne, but what is in answer to his Lordship.

Lord Chancellor. No, I only wished to know whether the affidavit could have been made this morning, and the gentleman tells me he thinks it cannot.

Mr. Horne. O, my Lord, I don't wish to hurry Mr. Abernethy.

Lord Chancellor. No, but it would be very convenient for me to have the affidavit made now.

Mr. Bourdillon. There shall be no time lost, my Lord, in making it.

Lord Chancellor. I think I have read, since I was here, Mr. Horne, every case that can be found on the subject; and therefore I am now ready at any time.

Mr. Bourdillon. Will your Lordship allow me to ask one question, merely for the guidance of Mr. Abernethy in making the affidavit, which is, whether the affidavit which your Lordship requires is to be an affidavit verifying the fact that Mr. Abernethy wrote these Lectures before he delivered them?

Mr. Horne. No, I object to that; Mr. Abernethy will of course make such an affidavit as he is advised.

Mr. Bourdillon. I only wish to know what I am to state, for the purpose of satisfying the conscience of the Court.

Lord Chancellor. I apprehend Mr. Abernethy will be advised by his own Counsel upon this point; but I take it to be the practice of the Court, where an Injunction is moved for, on account of a piracy of a book, that the book and the thing which is said to be the piracy of it, are both produced according to the ordinary rules of the Court.

Mr. Horne. And verified by affidavit.

Lord Chancellor. Yes. And then the ordinary way is, and in stating that I don't apprehend that I am giving any advice at all—but the ordinary way, and what is done every day is, to refer to book marked *A*, for instance, as being the book of the Author, and to the book marked *B* as the pirated Work.

Mr. Bourdillon. But unfortunately, my Lord, that is not this case.

Lord Chancellor. Eh?

Mr. Bourdillon. Unfortunately, my Lord, that is not our case.

Lord Chancellor. No, but the case here is a case in which (whether stated on affidavit or not) Mr. Abernethy wrote, and has a copy of these lectures in writing; now the writing must either go for nothing, or it must be equivalent to something proved in the cause; therefore that writing must be proved; and when it is proved, it will be my duty to declare—judicially to declare—how far that writing, as against the publication, constitutes the usual ground for an injunction, or how far it falls short.

Mr. Horne. My Lord, out of Court I would take for granted any thing that Mr. Abernethy might say; but in Court, of course, he must be treated like every other person.

Lord Chancellor. O, certainly. And I am much obliged to you, Mr. Horne, for interposing to prevent my being asked for advice; because there is hardly an hour in the day in which

I am not asked for advice, and there is hardly a day in the year in which I am not compelled to say I can give no advice.

TUESDAY, DEC. 21.

Mr. Shadwell. My Lord, will your Lordship give me leave to say, that in that case of The Lancet no affidavit has yet been filed by Mr. Abernethy.

Mr. Rose. My Lord, I believe that Mr. Solicitor General has the same instructions that I have; he is not here at present, but our instructions are, that the gentleman who is engaged for Mr. Abernethy is necessarily very busily engaged at Guildhall to-day, so as not to have been able to get the affidavit ready by this morning.

Lord Chancellor. The gentleman said yesterday, he did not know whether he would be able to be prepared by to-day or not, and therefore let it stand till to-morrow.

Mr. Shadwell. Yes, my Lord, but I merely wish to mention further, that your Lordship knows the week is wearing away, and of course the injunction is not to be kept up from day to day, waiting for the other side to be prepared.

Lord Chancellor. But then, Mr. Shadwell, if you had a leg to be cut off, you would think it very hard if I were to order Mr. Abernethy to make an affidavit instead of cutting off your leg.

Mr. Shadwell. O, certainly, my Lord, I should.

Lord Chancellor. Therefore, let it stand till to-morrow morning.

WEDNESDAY, DEC. 22.

Lord Chancellor. I want to know whether you have made an affidavit in the Lecture case?

Mr. Crowe. No, my Lord, no affidavit has yet been made.

Mr. Horne. No, my Lord, I understand not; the plaintiff has not thought proper yet to file an affidavit, and of course this is not to be kept hanging over our heads from day to day.

Mr. Rose. Your Lordship was good enough yesterday to advert to the engagements of Mr. Abernethy, which have certainly been continued longer than was expected, and also the Solicitor employed for him has been very much engaged at the trial of an issue directed by this Court, so as not to have been able to give his undivided attention to this case; but the affidavit is in a state of preparation. I have seen a draft of it, my Lord.

Lord Chancellor. When will you make the affidavit?

Mr. Rose. It will be made this morning, I have no doubt.

Mr. Horne. Then you will give us a copy of it as soon it is made.

Mr. Rose. O yes, you shall have a copy of it.

Lord Chancellor. Let it come on to-morrow morning then.

Mr. Horne. But I hope your Lordship will not permit it to remain over longer than till to-morrow morning.

Mr. Rose. O, Mr. Horne, you need not express any such anticipation, for I am pretty sure we shall be ready by to-morrow morning.

Mr. Horne. Yes, yes, but my fears are a little justified.

THURSDAY, DEC. 23.

The Affidavit of Mr. John Abernethy

Saith that he has given his lectures mentioned in the pleadings of this cause, as he believes most lecturers do, orally, and not from a written composition by this deponent, at the time of delivering his said lectures; but this deponent saith, that previous to the delivery of such lectures, this deponent has from time to time committed in writing notes of such his said lectures, which have been increased and transposed, until a great mass of writing has been collected, written in as succinct a manner as possible, with a view to exhibit the arrangement he has formed, and the facts which he has collected together, with his opinions relative to certain subjects of surgery. And this deponent further saith, that a considerable portion of such notes have been by or under the direction of this deponent extended and put into writing with a view to publication, and which writings he is ready to submit to the inspection of any respectable and competent person, as a test of this deponent's accuracy in the statement made to the court in this deponent's former affidavit, and that such writings are in this deponent's posses-

sion; but this deponent saith, that at the time of delivering his said lectures, he did not read or refer to any writing before him, but that he delivers such his lectures orally, and from recollection of such notes and writings, and that the lectures so delivered by him, though not verbatim the same as the notes and writings of this deponent, yet that they are in substance, arrangement, and statement of the facts, substantially the same. But inasmuch as such lectures are so delivered by this deponent orally, varying from time to time both in the language and arrangement, according to circumstances, and from any new matter that may have occurred to him by way of illustration or otherwise; this deponent saith, that on a comparison of the written notes or lectures of this deponent with those so orally delivered by this deponent, they will and must necessarily vary, and in like manner they will be found to vary, from the lectures pirated, or alleged to be pirated, by the defendants, in the publication called The Lancet. And this deponent further saith, that the composition of this deponent's said lectures, so reduced into writing, have cost this deponent much time and study for a long series of years. And this deponent further saith, that his duty as a surgeon to St. Bartholomew's Hospital and lecturer are entirely distinct, and that it is not a part of his duty as such surgeon to deliver lectures, but that the same are in the nature of private lectures by this deponent, and are not attended by any persons unless by permission of this deponent so obtained, as in this deponent's former affidavit mentioned, and the same are not in any way open or accessible to the public.

Lord Chancellor. Now, have you any thing more to say in that case of The Lancet?

Mr. Shadwell. If your Lordship pleases, will your Lordship allow that to stand over for a few minutes until Mr. Horne can come into Court? He is detained from being here this morning in consequence of having to attend the funeral of a relation.

Lord Chancellor. O, certainly.

Mr. Horne having come into Court, the cause was resumed, about two hours afterwards, by the

Lord Chancellor asking—Now, what do you say in that case of the Lancet?

Mr. Solicitor General. My Lord, in that case your Lordship was pleased to ask whether Mr. Abernethy proposed to state any thing further upon affidavit. My Lord, he has now filed an affidavit, and the general tenor of that affidavit is that he has prepared in manuscript, at considerable labour, the lectures in question. He says, "that previous to the delivery of such lectures, this deponent has from time to time committed to writing notes of such his said lectures, which have been increased and transposed." Then he says, "that they are in substance, arrangement, and statements of the facts, substantially the same. But inasmuch as such lectures are so delivered by this deponent orally, varying from time to time both in the language and arrangement according to circumstances, and from any new matter that may have occurred to him by way of illustration or otherwise; this deponent saith, that on a comparison of the written notes of the lectures of this deponent with those so orally delivered by this deponent, they will and must necessarily vary, and in like manner they will be found to vary, from the lectures pirated, or alleged to be pirated, by the defendants:" That is to say, the written notes are not the same as the lectures that are published, which your Lordship recollects were admitted to be verbatim statements of what fell from that gentleman. My Lord, this is the general tenor of this affidavit, and which certainly, I confess, leaves the case where it was before. The affidavit goes on to say, that the composition of the lectures reduced into writing have caused him "much time and study for a long series of years." Now, my Lord, this, as I say, is the general tenor of the affidavit, and which, as it seems to me, leaves the case just as it stood before, merely stating the facts that were stated before.

Mr. Rose. My Lord, I am with the Solicitor General in this case, and I don't know that I can now carry it further than we did on the former occasion. The points the plaintiff raised were first, the identity of the lectures; he next put it *re bene esse*, if I may so state it, upon the face of the bill, showing that they were the same; and the third point he raised was, that of a breach of trust as between pupil and preceptor. According to the point put by your Lordship, it appeared that there would be no difficulty, if it appeared that the subject of the lecture existed in writing verbatim, or to a very great degree of accuracy, written by the learned lecturer, from his impressions before he delivered the lectures. Now, I must say, if we are to look at this case as a case in which the lecture was delivered from writing, the affidavit would not carry it to that extent; for example, he could not bring into this

Court the writings as a test to prove the particular words that were delivered by him; but it appears that he has some written composition of the lectures, this he states upon his affidavit; and he next pledges himself that what he has given to the public as his lectures are the result of much study and of much time; that they have been considerably reduced into writing, but that the lectures as delivered by him undoubtedly vary from his writings, by his extemporaneous delivery of them, in consequence of mixing them with many observations and anecdotes which particular circumstances might bring to his mind at the time of the delivery. Then upon the principles of this Court, the matters being reduced into writing, though different from the delivery, the question will be whether the Court would interfere to protect the learned lecturer upon the grounds stated in the former arguments. My Lord, it was upon that he filed his bill; it was not for the purpose of raising the question of profit, not coming here upon the avowed principles of being protected for having any profits arising from this work; he stood here in the situation and in the character of a lecturer, delivering his lectures unreduced into writing, to those who stood in relation to him of pupil and preceptor; and putting this for the first time where he could fix it in the first instance, he was for the purpose of legal reasoning in possession of the copy, and would come within what your Lordship will find in my Lord Mansfield's doctrine, in the case of literary property, where the preserved identity of the lecture is in any way preserved; and undoubtedly we have put in an affidavit stating the existence of writings of those lectures upon the ground of identifying them, but it would be impossible for Mr. Abernethy to say that they are the same in all respects, but the affidavit I apprehend is sufficient to justify him in applying to your Lordship, for he would be the last person in the world to apply for an injunction on grounds upon which your Lordship might think he ought not to have an injunction. My Lord, your Lordship was pleased to say, that it was not only from him you desired to have an affidavit, but the parties having got possession of those lectures, your Lordship wished them also to make an affidavit stating how they became possessed of the lectures, and I apprehend your Lordship will think that the Court ought yet to have an affidavit from them to that effect. My Lord, will your Lordship allow me to put the case, and to see how it stands in that respect.

Mr. Horne.—But perhaps it is right that we should ask, whether my learned friend is re-arguing the case?

Mr. Rose.—No, Mr. Horne, I am not; I am making an observation upon Mr. Abernethy's affidavit.

Lord Chancellor.—Upon that affidavit?

Mr. Rose.—Yes, my Lord, upon this last affidavit.

Mr. Horne.—Certainly, the affidavit would justify any observation.

Mr. Rose.—If it would justify any observation, Mr. Horne, I can assure you that I am not the man to make it.

Mr. Horne.—O, certainly not, I don't say you are.

Mr. Rose.—Now, my Lord, I was going to say that your Lordship parted with the case when it was last before the Court, desiring to have an affidavit from Mr. Abernethy, throwing out, at the same time, that at least your Lordship thought the defendants ought to put the Court into the possession of the knowledge of how they became possessed of the notes of these lectures, by an affidavit; and your Lordship accompanied that by saying, that your Lordship could not in strictness compel them to make an affidavit on such terms. They have not, however, made such an affidavit; and I apprehend your Lordship, in looking at the case as it is now put, will give us the opportunity of dealing with the arguments, in consequence of their silence, of the relation of pupil and preceptor, strictly as against them; for I am dealing with the case now upon this affidavit, as your Lordship will see, and also upon the affidavits upon which the case originally stood, that Mr. Abernethy, as a lecturer, received certain persons to the benefit of his lectures, upon an admission fee being paid for that purpose, and that it was confined to persons so coming into his lecture-room upon an admission fee being paid for that privilege; he, therefore, stood as a lecturer whose lectures became exposed to the public by some person, who, by the means of short-hand writing, had taken down his lectures as delivered, and given them to the press. We stated, therefore, a case to your Lordship clearly originating from the strongest circumstances, that there had been a breach of trust arising out of the relation subsisting between him and those parties, which this Court would protect. The way the other side met that was this: that Mr. Abernethy was not giving lectures to private pupils, but that he was lecturing in the discharge of his public duty, intimating and conveying by that, which, however, they did not venture to

swear, that the theatre in which he was lecturing was open to the public.

Lord Chancellor.—Is this observation upon the affidavit, or in reply?

Mr. Rose.—Upon the affidavit now before the Court, my Lord, and which I will state to your Lordship in one moment. My Lord, he says, "that his duty as a surgeon to St. Bartholomew's Hospital and lecturer are entirely distinct, and that it is not a part of his duty as such surgeon to deliver lectures, but that the same are in the nature of private lectures by this deponent, and are not attended by any person, unless by permission of this deponent, so obtained, as in this deponent's former affidavit mentioned, and the same are not in any way open or accessible to the public."

Lord Chancellor.—I can save you the trouble of commenting upon that, because I think I expressed an opinion, upon the affidavits filed before, that what was stated about his being surgeon to the Hospital was not that which would prevent my injunction at all, and it stood over for this affidavit merely. And I apprehend, indeed I stated so before, but I don't know whether you were in Court, Mr. Rose, at the time, that the question of trust had been raised in the reply only.

Mr. Rose. My Lord, I don't know how that was in stating the case, but your Lordship will find, that in terms it is stated on the face of the bill.

Lord Chancellor. It may be in the bill, but it was not in the arguments, not until the reply.

Mr. Rose. But your Lordship will find it put in an express charge in the bill, and expressly sworn to in the affidavits.

Mr. Horne. Certainly not, no such thing is sworn to.

Mr. Rose. Still I shall certainly consider that part of our original case undoubtedly open to your Lordship.

Mr. Horne. But it certainly was not opened to his Lordship.

Mr. Rose. My Lord, my firm impression was, that it was one of the points I made in the arguments, upon the three grounds which I have stated. However, not to detain your Lordship further upon that, I would now put the case in this way, I think it is quite clear from our affidavit, and from their silence, that Mr. Abernethy not being a person in this instance called upon to discharge a public duty, it is quite clear that those notes have come before the public by the act of some person or persons standing in the relation of student or pupil to Mr. Abernethy, and that your Lordship will look at this in the nature of a trust; that is the way in which I humbly submit this case to your Lordship, and to which the tenor of this affidavit goes, and with respect to which I have a strong opinion, but, of course, only with such confidence as becomes me, I have a strong opinion that the right of property exists in the strong manner in which we put it, namely, that it is property collected by the labour of the plaintiff's mind, by diligent study, and the advantage of long experience, and which forms a case, though it is not in writing, which this Court will not think him without protection in.

Mr. Horne. My Lord, if this case stood over for my learned friends to give your Lordship an opinion, and a strong opinion too, they have done it; for I think my friend, Mr. Rose, in particular, has given your Lordship a very strong opinion, but he has given no information upon the case. I understood your Lordship to give an opinion, and to say, you were judicially to give an opinion upon what was before the Court, and that your Lordship did not call upon us to give any opinion whatever. What I understood your Lordship to say was, that you called upon Mr. Abernethy to state to the Court, whether the lectures were delivered orally or from writing, or what notes there were of them. Now, my Lord, I think my learned friends like any thing but their own affidavit, for when we find that happy perspicuity of style in The Lancet (for I am sure it does great credit to Mr. Abernethy,) and when we compare that with the unhappy perspicuity of this affidavit, I cannot sufficiently express my astonishment upon this occasion. If they were to dwell on this affidavit, they would make the case much more obscure than it was before, though the object of directing the affidavit to be made was, that they should not make the case more obscure, but that they should make it more clear; but we find ourselves, by this affidavit, under the necessity of looking at the case in a more obscure way, though the obscurity of the case before led to Mr. Abernethy's being desired to make this affidavit. Now, my Lord, I shall certainly read the affidavit of Mr. Abernethy, first premising that we, as Mr. Rose has said, have made no new affidavit on the occasion, nor did your Lordship call upon us to make any such affidavit; your Lordship left it to our discretion in the discharge of our duty whether we should make an affidavit or not; my Lord, we think proper to make none, but we leave the case as it was; and I shall now with your Lordship's permission, read the affidavit of

Mr. Abernethy, not attempting to comment upon it, for I believe it will be better to read it without comment, and then your Lordship will see, whether it is possible for your Lordship to understand it. My Lord, he says:—"That he has given his lectures mentioned in the pleadings of this cause, as he believes most lecturers do, orally, and not from a written composition, read by this deponent at the time of his delivering his said lectures, but this deponent saith, that previous to the delivery of such lectures, this deponent has, from time to time, committed in writing notes of such his said lectures, which have been increased and transposed until a great mass of writing has been collected, written in as succinct a manner as possible, with a view to exhibit the arrangement he has formed, and the facts he has collected together, with his opinion relative to certain subjects of surgery."—Now, my Lord, it is quite clear, that these notes cannot be the notes referring to those lectures, for the lectures only began in October last, and have ended,—ended under the *threat* of your Lordship's Injunction in the month of December; this great mass of materials therefore, must be materials, which in no shape can be considered as applying to these lectures. He says—"that a considerable portion of such notes have been by or under the direction of this deponent extended, and put into writing, with a view to publication, and which writings he is ready to submit to the inspection of any respectable and competent person, as a test of this deponent's accuracy in the statement made to the Court in this deponent's former affidavit:"—So that here, Mr. Abernethy says, as I understand him, that he has not a wish to make a new statement, he only wishes to say, that his writings may be submitted to some respectable and competent person to see whether the statements made in his former affidavit were correct; why, my Lord, we have not the least doubt that it was correct; my learned friend Mr. Shadwell and myself have not the least objection to admit that it was perfectly correct, but we say, that from the statements in it, and the perspicuity of the publication of these lectures, it is to be concluded, that they were not delivered from writing, and then, my Lord, he states—"That such writings are in this deponent's possession, but this deponent saith, that at the time of delivering his said lectures, he did not read or refer to any writing before him, but that he delivers (in the present tense) such his said lectures orally, and from recollection of such notes and writings, and that the lectures so delivered by him though not verbatim are the same as the notes and writing of this deponent, yet that they are in substance, arrangement, and statement of the facts, substantially the same."—Just as my learned friend, the Solicitor General, delivered his very able argument in this case orally, but interspersed with some quotations from cases, or rather misquotations from cases, I should say, if I may say so without meaning to offend him, just as he delivered his argument orally, about which, my Lord, there can be no doubt! The lectures so delivered by him, though not verbatim the same as the notes and writings of this deponent, yet that they are in substance, arrangement, and statement of the facts substantially the same. Now here, therefore, is a passage containing an assertion, that they are "in substance, arrangement, and statement of the facts substantially the same." But that is not all, for he goes on to say, "but inasmuch as such lectures are so delivered by this deponent orally, varying from time to time both in the language and arrangement, according to circumstances, or from any new matter that may have occurred to him by way of illustration or otherwise." So that we have here, according to Mr. Abernethy's style in his affidavit, which I can hardly suppose is his own style, we have here two propositions; if they mean any thing, the one proposition is, that the lectures "are in substance, arrangement, and statement of the facts, substantially the same." And the next is, that they vary "from time to time both in the language and arrangement, according to circumstances, and from any new matter that may have occurred to him by way of illustration or otherwise." And how these two propositions are to be reconciled to each other I will leave to your Lordship to say. He says, "that on a comparison of the written notes or lectures of this deponent with those so orally delivered by this deponent, they will and must necessarily vary." Now, in the first place, I do not know—except by an inference from this strange affidavit, I do not know what his notes are; he has not shown them, and we are left in the dark as to what they really are, but he says, "they will and must necessarily vary, and in like manner, they will be found to vary from the lectures pirated, or alleged to be pirated, by the defendants in a publication called The Lancet." So that here Mr. Abernethy, the sole plaintiff, the only person who complains of the piracy, does not venture to say, even in this fresh affidavit, that there is a piracy;

but he treats it as a mere stranger would treat it, by saying, that it is only an *alleged* piracy, in which I say, he entirely fails. My Lord, he, the only person who is complaining, does not venture to treat this as a piracy, but he qualifies it with the words, *an alleged* piracy. And that is to be found in this perspicuous affidavit, upon which your Lordship is called to vary what your Lordship stated the other day. He says that the composition of this deponent's said lectures so reduced into writing have caused this deponent much time and study for a long series of years. So that your Lordship sees an addition to the first observation upon this affidavit, which I took the liberty to presume to make, namely, that these could not be the writings of the lectures published in The Lancet, which were only began to be published in the month of November last; it is perfectly clear from this statement, that this mass of materials, so reduced into writing, has caused him "much time and study for a long series of years." What statement is there that there are any of these lectures reduced into writing? Here is some sort of a statement, that there have been notes of some lectures reduced to writing, but I cannot find any thing here stating *what particular* lectures have been reduced to writing, and much less *the way* in which they have been reduced to writing. My Lord, he says, "that his duty as a surgeon to St. Bartholomew's Hospital and Lecturer are entirely distinct;" but I do not comment upon it, for your Lordship stopped my learned friend when he was going upon it. Now, my Lord, if this case stood over for the purpose of an affidavit being made to make this case more clear, I think I have nothing to do but respectfully to ask your Lordship to compare this with the previous affidavit Mr. Abernethy has made, and then to say if it makes it in any one respect whatever more clear. So far from making the case more clear, it makes it much less clear, and it must be for the purpose of withdrawing attention from his former affidavit that he is now making statements so involved and so perplexed, as that I cannot tell what is the meaning of them, or what was meant to be represented to the Court. My Lord, I make this observation, because upon comparing this affidavit with the statements to be found in The Lancet, (which your Lordship will recollect Mr. Abernethy complained of on the ground of being perfectly correct) I cannot but think that the object was to make it so perplexed and so involved, as in truth, my Lord, and in terms (for I cannot find out any other meaning), to give up the whole of his case.

Mr. Shadwell.—My Lord, when your Lordship heard this case before, that had occurred to your Lordship which had occurred to Counsel, that according to the case made upon the record, it was not averred that the Lecture was correspondent with any writing.

The Solicitor-General.—No, we admitted that at the hearing.

Mr. Shadwell.—Just so, because the expression which was used, was an expression not tending to show that the Lecture was delivered as from writing. Now, my Lord, I understand that your Lordship supposed there was some doubt about the ambiguous expression used in the affidavit, and therefore that your Lordship gave Mr. Abernethy leave to make another affidavit upon the subject. Now your Lordship sees that Mr. Abernethy has receded from his former statement, and no longer tells your Lordship, that the Lectures were delivered from writing, but, as I distinctly understand, that they were not delivered from writing, for he says he delivered his Lectures, "as he believes most Lecturers do, orally, and not from a written composition." And a passage in which Mr. Abernethy states—he delivers such his said lectures orally and from recollection of such notes and writings, and that the lectures so delivered by him, though not verbatim the same as the notes and writings of this deponent, yet that they are in substance, arrangement, and statement of the facts, substantially the same; but inasmuch as such lectures are so delivered by this deponent orally, varying from time to time, both in the language and arrangement, according to circumstances, and from any new matter that may have occurred to him by way of illustration or otherwise, "proves most clearly, that when Mr. Abernethy gets up to make a statement, as lecturer, he trusts a good deal to the circumstances of the moment, and he alludes to things that have occurred since he reduced to writing what had occurred to him to be substantially (to use his own statement) his statement as a lecture. So that, my Lord, under that impression, in making such an affidavit as this, I apprehend this is the means, as my learned friend Mr. Rose says, this is the means by which a party thinks that he may go out of Court in a creditable manner; that is, having made an obscure affidavit at first, he has now made an affidavit upon which the law of the land will not allow this Court to interfere on his behalf.

The Solicitor-General. My Lord, really

I don't understand what my learned friends mean; they represent Mr. Abernethy as if he were a delinquent; they attack him as if he were a delinquent defendant. My Lord, more unfounded statements never were made, than to say that he has given up his case; I would toss my brief out of Court, and never permit myself to see Mr. Abernethy again, if he were to give up his right; that right which every lecturer, in every hospital and in every university, clearly has. I say he would be disgraced if he gave up that case, and if that were his idea or feelings, his counsel would return back his brief, or rather throw it into the fire, than suffer him to do so. My Lord, let us look at this gentleman's character; Mr. Shadwell says this is a means by which he is to go out of Court creditably; why, my Lord, this respectable gentleman will always be respectable and creditable wherever he goes. Mr. Shadwell says the first affidavit is obscure, and that this second affidavit is more obscure; says Mr. Horne, the first affidavit is not very good, and this is still worse. Now, my Lord, let us see what the case was—we before admitted that Mr. Abernethy did not pronounce his Lectures from a written book; if he had done so, *cadet quæstio;* there would have been an end to the thing at once, because, if a man reads a lecture in a private room, he has as much of a copyright in that lecture as if it were printed. But, my Lord, it was material to observe how far The Lancet was a copy of any notes Mr. Abernethy might have delivered or might have had to assist him in the delivery of his Lectures. Now, the affidavit was this, that the notes were, and are, the writings composed by Mr. Abernethy, but that they were not read; therefore, that amounts to an admission that the Lectures were not read from writings, but claiming the authority of having composed the Lectures; however, the expression, taking it altogether, left the case open and uncertain as to how much could be considered as having been delivered from notes, and how much could have been considered as having been delivered extemporaneously and not from notes. Now, that part, we said, was certainly not so fully made out as it might have been; but we distinctly admitted that we had not a precise copy, or any thing like what could be called a precise copy, of the Lectures delivered. Now, what is it that is now stated? It is stated in terms rather more fully, and in my apprehension no man of honour and of truth could make a more fair affidavit than this, which goes still farther than the former affidavit did, and which says that the Lectures which were delivered were not, in point of text, if I may so express it—were not copies from writings; and the more Mr. Abernethy recedes, if I may so say, from any statement that may have been made that the Lectures were delivered from writing, the more it is to his credit, and the more consonant it is with truth. If the former expression could be considered as raising a doubt whether he meant to swear that he delivered the Lectures from writing or not, Mr. Abernethy certainly receded from that, and in terms distinctly admitted that they could not have been delivered from writing, and therefore he is now attacked for making what the gentlemen are pleased to call *a more obscure* affidavit. But, my Lord, what is the upshot of this affidavit? It is to be found in the passage I have read to your Lordship, and I read that passage, for I thought it would bring the tenor of the affidavit before your Lordship, which admits that they were entirely delivered orally, and not from writing. Now, my Lord, let us see what the affidavit says; it says, "that a considerable portion of such notes have been, by or under the direction of this deponent, extended and putin to writing with a view to publication, and which writings he is ready to submit to the inspection of any respectable and competent person as a test of this deponent's accuracy in the statement made to the court in this deponent's former affidavit." He stating that he had been in the habit of putting many of these lucubrations and reflections of his own into a shape for publication. Then he states that such writings are in this deponent's possession, but this deponent saith, that at the time of delivering his said lectures, he did not read or refer to any writing before him." Now this is what the gentlemen call an equivocal affidavit; why, my Lord, it is an affidavit which this gentleman has made in order to meet what has been called equivocal in his first affidavit, and states, not only that his Lectures were not delivered from writing, but that "he did not read or refer to any writing before him, and yet the gentlemen attempt to involve Mr. Abernethy in a state of delinquency, for first wishing to protect his property, and next for taking the mode by which it can be preserved. They impute to him confusion and perplexity, for not making his affidavit in different terms to those in which it is made, though no man living can express himself more distinctly by the use of the English language than he does in his affidavit upon the question put to him, namely, whether he delivered his Lectures from writing, or orally? Mr. Abernethy, in answer to

that, says, I never did deliver part or any of my Lectures from writing. Why, my Lord, my learned friends feeling a considerable warmth, I won't say towards Mr. Abernethy, but having a considerable feeling for their own client, have in pretty strong terms animadverted upon the conduct of the Plaintiff, who has expressed himself in as plain terms as the British language can enable him to do, and said that though the Lectures delivered are not verbatim the same as the notes, yet they are "in substance, arrangement and statement of the facts, substantially the same; but inasmuch as such Lectures are so delivered by this deponent orally, varying from time to time both in the language and arrangement according to circumstances, and from any new matter that may have occurred to him by way of illustration or otherwise, this deponent saith, that on a comparison of the written notes or lectures of this deponent with those so orally delivered by this deponent, they will and must necessarily vary, and in like manner they will be found to vary from the lectures pirated, or alleged to be pirated, by the defendants, in a publication called 'The Lancet.'" Here is again another charge of the obscurity of the affidavit; but, to my apprehension and perception at least, it conveys this clear idea, that it is not pretended to state that the lectures delivered by Mr. Abernethy were from writing; for he totally disclaims it, confining himself merely to an arrangement on paper of the facts which had been collected by him.—My Lord, I think it is impossible for any gentleman to say otherwise. As to the prick of the surgeon's lancet, and the knife in the surgical operations which the faculty perform on his Majesty's subjects, why, they are, in point of fact, nothing, a mere nothing, when compared with what my learned friends are anxious to inflict upon Mr. Abernethy; and certainly they have retaliated with bitter vengeance upon Mr. Abernethy, for not speaking in distinct terms, in his first affidavit, what he meant. I hope, therefore, my Lord, your Lordship will think, as every gentleman ought to think, for though the gentlemen on the other side disclaim any attack on this gentleman's character, yet their arguments do that which they themselves disclaim; though their arguments disclaim any attack on this gentleman's conduct, yet they say, that having made a former obscure affidavit, he has now made a more obscure affidavit. My Lord, I say that this gentleman has made a most distinct affidavit, with as distinct a declaration in it against himself as any man could make, that the lectures were not delivered from writing, or from any notes prepared for that purpose: I hope therefore, your Lordship will be of opinion, that this gentleman has fulfilled what your Lordship called upon him to attend to. My Lord, it is not my intention to go over the case further. Your Lordship has been pleased to say, that with respect to the argument that we rested our case upon, the breach of trust as well as literary property, was not gone so much into in the opening as in the reply. My Lord, I need not say, your Lordship's observation, with respect to that, is, as your Lordship's observations never fail to be, correct. And I will say, that the reason of that was, that the point of literary property at first appeared to us to be the stronger ground, though I took the liberty in my reply to put the other case; and though I thought the case of letters was a strong case, yet the ground on which I thought literary property was a rather stronger case was, that it might be said, those gentlemen are strangers coming into the room, and as we could not prove they got the notes from any pupil, our case must fail; if we could not prove that they got the notes from a pupil, then the editor or stranger coming into this room would have to be considered as a stranger, and then the question would arise, whether the point of protection could be carried the same length as if the information had been given by a pupil. It was upon that ground that I took the liberty of pressing the one case more than the other; and it did appear to me that it was an idle thing to say that a man who delivered a course of lectures, because he did not take time to write them out and print them, saying I shall print these lectures when I have read them all through, that an editor could come into the room, saying, No: I shall publish them in this little publication; I don't mean to say by that that I decrease the value of the publication or depreciate the merits of the gentleman who does it; but if a gentleman who lectures were to say, I shall publish the lectures at the end of a month, and if a stranger were to step in and say, I shall publish them at the end of every week, as they go on, it would be idle to say that that would not put an end to the publication. My Lord, I took the liberty to say in my reply, that this appeared to me to be a breach of trust, because letters constituted a sort of property, and that all the doctrine of secresy which applied *a futuri* to that case, was detrimental to a person publishing the lectures of a lecturer, which he delivered in public. Upon these grounds, my Lord, I hope it

will be your Lordship's judgment upon one or other of these two passages that your Lordship ought to issue your injunction. The gentlemen have said your Lordship did not desire them to make an affidavit, as to how they got possession of those notes, whether they got them from a pupil, or whether they took them down themselves in short hand; they have not, however, my Lord, made an affidavit to that effect; but I must take the liberty of saying, if they had made such an affidavit it would not have strengthened their case, for if they had said it was not from a pupil they received them, then the editor would have had to stand in the place of the pupil, and then the question would be, whether the doctrines of letters would apply? The gentlemen say we have not alleged in our bill that we gave no authority to communicate those notes. My Lord, we have alleged in our bill, that we gave no pupil any right to communicate the notes, and we have sworn that in our affidavit. It is upon these grounds we hope, and indeed have no doubt, that your Lordship will deal with this case as it deserves; undoubtedly it is a case which must be considered a case of considerable importance. The gentlemen say Mr. Abernethy has given up his case. My Lord, I shall give up my understanding if Mr. Abernethy gives up his case; I shall confess that I have lost a great deal of my understanding if Mr. Abernethy gives it up. My Lord, we are ready to try this question in any Court, if it be thought necessary, though I apprehend the Court of Chancery has originated some of the most important doctrines that can be found as applying to the case; but if it be supposed that we are making an unhandsome retirement, and thereby meanly and disgracefully surrendering up all the large rights of the persons I have mentioned or alluded to, I can assure my learned friends, that no such retirement is contemplated on the part of those who have argued this case. But if it be your Lordship's opinion, that because this precise case has not been decided; if it should be your Lordship's opinion, that it is fit to be decided, but not in this Court; if your Lordship can put us into such a way as, your Lordship may think, we can have the question tried upon the question of property, and by another jurisdiction, though I should say there is no tribunal so well calculated to decide it as this Court, yet we would go to the highest tribunal with it, so little are we, at least the counsel for the plaintiff, disposed to retire from fully investigating the case; we should not be unwilling to try it in any tribunal in the country, and in the last Mr. Abernethy will try the question, or he will be guilty of a gross dereliction of his duty to himself, to the faculty, and to every man who stands in the universities in Ireland, in Glasgow, and in all the universities in this country; I mean, if he avoids having the judgment of the last court in the country, if he is not fortunate enough to have your Lordship's judgment in his favour. My Lord, I have stated thus much from the firm persuasion that all subjects of this sort are better decided in this Court, than elsewhere; but if your Lordship's opinion is to the contrary of that, and if you should think it ought to be decided elsewhere, why we are ready to go elsewhere; but, my Lord, your Lordship will permit me to say, that a question of a breach of trust is one which cannot go elsewhere, because I believe an action on a breach of legal trust could not arise here. And though it may be said that my friend Mr. Rose and myself did not allude particularly to that in our opening speeches, yet I did raise that point in my reply; we did not do that because we thought it might be said, it did not apply; but, my Lord, that view of the case jointly with the other is a view in which the judgment of your Lordship alone, and the jurisdiction of this Court alone, is conceived. It is upon these grounds, my Lord, that I hope your Lordship's opinion will be given upon one or other of these points; and your Lordship will permit me to close this with one more observation in reply, which is, that if your Lordship should be of opinion that the Court can decide this upon a breach of trust, then it will not be necessary to decide the more dry question of law, whether a lecturer, delivering an oral lecture, not from writing (the hypothesis with which I began,) whether a lecturer or preacher delivering an oral lecture or sermon, not from writing, has a right of property in that which he so delivers. I say, my Lord, if we succeed in the breach of trust, then it will not be necessary to decide that dry point of law. But if your Lordship should be against us on the latter point, and dropping the point of literary property, if your Lordship cannot decide it for us on the ground of trust, then it will be, if your Lordship should think it fit, that we should go to another tribunal, to show our disposition to retire from the Court of Chancery, we shall only be willing to retire from it to carry our case to the last resort, to the last place to which it can be said we can go; for if any man thinks there is a difference between a man practically delivering the fruits of

his labour without writing, from delivering it from writing, from materials which, in point of ownership, ought to give him but an equal right of copyright, that is a question which ought to be decided. It is upon these grounds that I have stated myself more fully upon this case than otherwise perhaps I should have done, in order that it may be known that neither Mr. Abernethy nor his counsel have receded one step from the right they consider he has.

Mr. Horne.—My Lord, I hope it wont be considered that I rise in order to reply upon Mr. Solicitor General, for that I do not mean, but simply to disclaim having thrown out any thing whatever like an imputation upon the character of Mr. Abernethy. And I feel it to be due to Mr. Abernethy, due to myself, and due to the many very respectable young persons, pupils of Mr. Abernethy's, whom I now see in Court, to say, that I hope they will still continue to look up to him with that undiminished reverence and respect, to which I am quite sure he is entitled.

The Lord Chancellor. I think I may dispose of this last observation by saying, that I have always understood (I don't happen to know any thing at all of Mr. Abernethy), but I have always understood Mr. Abernethy to be entitled to the highest possible respect; and I can, with the greatest conviction of truth, say, that whether his case remains in this Court or goes out of it, his character will remain just as respectable as it ever has been. I own I had very much made up my mind upon this case before I came into Court to-day: if Mr. Abernethy had produced in Court the writings of which he says his lectures were really delivered, so that I might myself have exercised a judicial opinion upon those writings, and have seen that his lectures, though orally delivered, were delivered from what I should say was a *literary composition*, I should have had no difficulty in the case. If, on the other hand, in comparing what is said to have been orally delivered, and what has got into this book called *The Lancet:* if, upon comparing the notes with what is said to have been orally delivered, I could not accurately have referred the publication to those notes, as being the same, (I mean with those trifling literary distinctions which must exist in such cases) I should then have known what to have done, by not applying myself to any thing but a reference to those authorities which it is always satisfactory for every judge to have. But I apprehend, that if those notes are not [illegible] and made substantially made [illegible] of the case before me, the Court has but two ways of proceeding left to it: the Court must either refer it to the Master to inquire whether what is admitted to have been published in this book is the same as the notes? or it must decide the case by calling upon the lecturer to deliver the notes to the Court itself, that the Court may see whether they are the same. And it may be very inconvenient—*very inconvenient*—to produce those notes; so much so, that I should not be surprised if a gentleman, such as Mr. Abernethy, would not rather suffer himself to go out of this Court without a judgment than produce the notes. But if he had gone to the Master, which would have been the more private way, the Master must have reported to me, and if there had been an exception taken to his report, there must afterwards have been a public production in this Court. The consequence of all this is, that I am compelled to look at it as at a lecture delivered orally. Well, in the case of "*Millar and Taylor*," there is a great deal said upon the subject, that a person must have a property in those sentiments and language—*in those sentiments and language*, though not deposited on paper; but I can only say upon that, that there has been no such decision upon that yet; and as it is a *pure question* of law, I think it would be going a great deal farther than a Judge in equity should go, to say upon that, that he can grant an injunction upon it before it is tried; *I* think *I* cannot do it consistently with the principles upon which this Court acts. There is another ground for an injunction, which is a ground arising out of an *implied contract*. I should be very sorry if I thought that any thing which had fallen from me, should be considered to go the length of this, that persons who attend lectures or sermons, and take notes (either identified in the way in which the Solicitor General has adverted to, or not), are to be at liberty to carry into print those notes for their own profit—those notes *for their own profit*, or, I will add, for the profit *of others*—I have very little difficulty upon that. But that must apply either to contract or breach of trust; and I do not find any thing else to which it can apply. Now, with respect to contract, I think it is quite competent for Mr. Abernethy, and for every other lecturer, to protect himself against this in future. There is a contract expressed and a contract implied; I don't apprehend that any person would think that in a lecture orally delivered, there was a contract implied, and yet I should be very sorry to have any man in this room understand that this Court would

not act as well upon a contract implied, as upon a contract expressed, provided only the circumstances of the case authorised the Court to act upon it. I have not the slightest difficulty in my own mind, none whatever, that a lecturer may say to those who hear him—you are entitled to take notes for your own use, and to take them, perhaps, in every way, except for the purpose of printing them for profit—you are not to buy my lectures to sell again; you come here to hear them for your own use, and for your own use you may take notes; there is no difficulty about it, for it is indeed the very doctrine laid down in the case of *Letters*. In the case of *Lord Clarendon*, with respect to *Clarendon's History* (I think it was) *of the Life and Restoration of Charles the Second*, the history was lent to a person, and an application was made for an injunction to stay the publication; it was said there that there was no ground for the injunction, and it was proved on affidavit (which is pretty nearly the same thing as what is stated in Mr. Abernethy's affidavit, but which I could not state, in consequence of your absence, before Mr. Shadwell) that my Lord Clarendon's son said, there is the book, and make what use you please of it; the Chancellor however of that day said, that he could not mean he was to print it for his profit. So with respect to the case of letters; the case of letters is left upon different grounds, so that one cannot say, *the* ground upon which the Court proceeds in the case of letters is so and so. My Lord Hardwicke says, in one case that is reported, that the person who parts with letters still retains a species of property in them; and he adds, the person who receives them has also a species of property in them. He may do what he pleases with the paper; he may make what use he pleases of the letters, *except print them;* there he puts it upon property. In other cases you will find it put upon the breach of a trust, and it is there argued, that it is property, part of which (for instance) *I* have retained, and part I have given to you; you may make what use of the special property you have in it you please, but you shall not make use of my interest in it; therefore you shall not print it for profit. Well, if there is an express contract—for instance, if Mr. Abernethy says, Gentlemen, all of you who attend, and pay five guineas (for instance) for attending my lectures, you may take notes of what I say, but let it be understood that you shall not print for profit; then in that case I should not have the least difficulty in saying, if any student afterwards did think proper to publish for profit, that there is hardly a term which this Court could think too harsh for him, and it would restrain him. There is another ground, which is, whether, looking at the general nature of the subject, those who pay a fee for attending the lectures, and I don't confine that to Mr. Abernethy's lectures alone—Sir William Blackstone, for instance—he read lectures, and others as well as him, some for fees, and some to entitle them to endowments, and so on; and I think it is very difficult to say, that there is not a contract there which would call upon the Court to restrain the parties who hear the lectures from publishing the notes they may have taken; they may make whatever use of them they please, but I think they ought not to publish them. Well, if an express contract exists, or if any contract is to be implied, either the expressed contract would clearly, and the implied contract, if it could be clearly implied, would be the ground of an action for a breach of contract. With respect to trust, that is another matter; and I think there is considerable difficulty in saying whether an action could be brought for that or not. Now the question here would be, whether there is not an implied trust with respect to the student himself? And that point is a very important point indeed in my judgment, which made me take notice that the other day the Solicitor-General raised that point very much in his reply; and though it may be stated in the bill, yet it was insisted upon so little, that it is but justice to the counsel on the other side for me to say, it did not surprise me that they took no notice of it at all in their arguments; nor do I suppose it was mentioned by Mr. Rose, nor until the Solicitor-General came to reply. And when I come to look at the case in that respect, I think it a very important one indeed. When I offered to the counsel, the other day, that the defendant might, if he thought proper, file an affidavit, I certainly did not mean to *require* him to do it; all I think I could judicially do would be to look at what I could judicially imply, if he made no affidavit. Now one thing is quite clear, which is, that if those lectures have been published from short hand-writers' notes, they have been published from short-hand writers' notes taken by some student, or from short-hand writers' notes taken by some intruder into the lecture-room, for I don't see how it is possible that they could have been taken otherwise. If there is either an implied contract on the part of the student, or a trust, and if you can make out that the student has

published, if you can also make out that there is that implied contract or trust, I should not hesitate to grant the injunction. With respect to the stranger, if this Court is not to be told (and certainly it has no right to compel the parties to tell) whether the power of giving the oral lectures to the public be by a student or not; if it is not to be applied to the student, I think it very difficult to tell me, that that should not be restrained which is stolen, if you would restrain that which is a breach of contract or of trust. But long before I came into this Court this morning, I had thought, that if you put it upon oral lectures, it must be tried whether it is legal to publish them or not; if you are to put it upon property in *language and sentiments* not put into writing, I give no opinion upon that, but only say, that it is a question of too mighty importance, considering what is said with respect to it in cases that I have read, for me to deal with it until it is tried. With respect to either matter of trust or contract, I have made up my mind as long ago as yesterday, that I could hear another argument upon that, if you wished it.

Mr. Horne. Then your Lordship does *not grant the injunction?*

The Lord Chancellor. No! You may move again on the ground of contract or trust.

Mr. Horne. But we are under no terms, my Lord?

The Lord Chancellor. No, certainly not.

The Solicitor-General. But probably your Lordship will not leave us to inuendo.

The Lord Chancellor. I give you leave, though I make no order to that effect, to move this very motion, to move this motion on the ground of breach of contract or of trust.

Mr. Horne. But which of course can't be done till after the next seal.

The Solicitor-General. Why, my Lord, I was going to say I would take the liberty of troubling your Lordship now upon the breach of trust.

The Lord Chancellor. An injunction may be moved for at any time, you know.

Mr. Shadwell. But after all this has taken place in this case, my Lord, I apprehend your Lordship will not hear it till after we are apprised of it.

The Lord Chancellor. O, no, certainly not; I shall not hear it *ex parte;* but if the motion is made to me, I may find some way of putting it into such an arrangement as may do complete justice to all parties.

The Solicitor General. Then, my Lord, I shall take the liberty of troubling your Lordship now with this case, moving it *ex parte.*

Mr. Horne. Certainly not, my Lord.

The Lord Chancellor. That you can't do, but you may give notice of it.

Mr. Shadwell. COMPLETE JUSTICE is to be done, my Lord.

The Lord Chancellor. You know a motion for an injunction may be moved at any time, in vacation as well as out of vacation, and if it is made in vacation, the Court will give an opportunity of having it discussed afterwards, but then the Court takes care that in that time of cessation from business no harm can be done.

Mr. Horne. My Lord, no harm can be done here to this eminent Lecturer.

The Solicitor General. What, no harm can be done by publishing these lectures.

Mr. Horne. Certainly not.

The Lord Chancellor. All I have further to say upon it is, that I have to beg it may not be understood that I have stated as all that there is no such breach of trust as would not constitute a case for an injunction.

Mr. Horne. No, my Lord, we don't ask your Lordship to say any such thing, and all we understand from what your Lordship has said, simply is, that your Lordship REFUSES THE INJUNCTION.

The Lord Chancellor. That's all.

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